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No. 91-904

In The

Supreme Court of the United States

October Term, 1992

CONCRETE PIPE AND PRODUCTS OF CALIFORNIA, INC.,

Petitioner,

vs.

CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF ON THE MERITS BY PETITIONER

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QUESTIONS PRESENTED FOR REVIEW[1]

(1) Do the provisions of the Multiemployer Pension Plan Amendments Act violate the Fifth Amendment rights of Concrete Pipe and Products, *as applied,* by retroactively imposing withdrawal liability on an employer who never had employees vested in the pension plan and whose collective bargaining agreements specifically limited liability to contributions made?

(2) Do the presumptions in 29 U.S.C. § 1401 favoring multiemployer plans like Construction Laborers Pension Trust for Southern California violate the due process rights of Concrete Pipe and Products by denying access to an impartial decision maker?

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[1] The petition for a writ of certiorari was granted limited to Questions 2 and 4 presented by the petition. Question 4 presented by the petition corresponds to Question 1 of this brief, and Question 2 remains Question 2. Petitioner has changed the order of the Questions Presented to conform to the structure of the Petitioner's Argument.

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[2] CERTIFICATION PURSUANT TO RULE 24.1(b) AND 29.1

The only parties to this action are those listed in the caption. Petitioner Concrete Pipe and Products of California, Inc. has no subsidiaries, and its parent corporation is Concrete Pipe and Products, Inc. Construction Laborers Pension Trust for Southern California, Respondent, is a Taft-Hartley Trust Fund, and to the best of petitioner's knowledge, has no parent or subsidiaries.

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I.

OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Ninth Circuit was entered on June 27, 1991, in an unpublished opinion (table entry at 936 F.2d 576 (9th Cir. 1991)). J.A. 431-432. A timely petition for rehearing and suggestion for rehearing *en banc* was filed. Both were denied on September 24, 1991. J.A. 433. The order granting enforcement of the arbitration decision and denying Petitioner's motion for summary judgment by the United States District Court for the Central District of California is printed in the Joint Appendix at pages 416-427. The arbitrator's decisions as enforced by the District Court are printed in the Joint Appendix at pages 205-216 and 378-402. An earlier Ninth Circuit decision finding the appeal from an order requiring arbitration premature was reported at 776 F.2d 1416 (9th Cir. 1985).

II.

THE SUPREME COURT'S JURISDICTION

The judgment of the U.S. Court of Appeals for the Ninth Circuit was entered on June 27, 1991. A timely petition for rehearing and suggestion for rehearing *en banc* was filed. Both were denied on September 24, 1991. The Petition for Writ of Certiorari was filed on December 3, 1991 and was granted on May 26, 1992 limited to questions 2 and 4 presented by the petition. The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. § 1254(1).

III.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The issues on which this court granted review involve the Fifth Amendment to the United States Constitution which provides in pertinent part:

> No person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation.

The statutory provisions challenged are contained in the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), which enacted Part 1, Subtitle E, Title IV of the Employee Retirement Income Security Act of 1974 (ERISA), codified at 29 U.S.C. §§ 1381-1453. The applicable statutory provisions are attached in Appendix A to this Brief at pages 1a-39a.

IV.

STATEMENT OF THE CASE[3]

A. Concrete Pipe and Products of California, Inc.

The Petitioner, Concrete Pipe and Products of California, Inc., ("CP&P") is a California corporation formed to establish an operation for the manufacture and sale of concrete pipe in California. Certain assets of Cen-Vi-Ro, a separate and distinct entity, were purchased in December 1976 (four years prior to the enactment of MPPAA) to create CP&P. CP&P and Cen-Vi-Ro had no relationship of any kind other than this arm's length sales transaction.

[3] All references to the Record ("R.") are to the Docket Entries of District Court Case No. 82-5184 except where otherwise stated.

The assets purchased included two plants with accompanying manufacturing equipment. One plant was located in Southern California in the town of Shafter. The other plant was located in Northern California, near Sacramento. CP&P sold its concrete pipe throughout the state. This case focuses on events at the Southern California plant, hereafter referred to as the "Shafter Facility".

After purchasing the assets which comprise the Shafter Facility, CP&P abided by the collective bargaining agreements between Cen-Vi-Ro and a number of unions including the Southern California District Council of Laborers (the "Laborers"). Pursuant to that union contract, CP&P made contributions (based on hours worked by its employees who performed duties as laborers) to the Construction Laborers Pension Trust for Southern California ("CLPT").

In 1978, CP&P negotiated a new contract with the Laborers covering the Shafter Facility. Contributions for pension under this contract continued to be measured by hours worked by covered laborers at Shafter. J.A. 75-76 at ¶¶ 8 and 10.

B. Construction Laborers Pension Trust of Southern California.

(1) CLPT's Basic Structure.

The Respondent CLPT is a multiemployer pension trust fund which was established in 1962. It is regulated by Section 302 of the Labor Management Relations Act of 1947[4] (codified as amended as 29 U.S.C. § 186) ("Section

[4] The LMRA is also known as the Taft-Hartley Act.

302"). Generally, Section 302(a) prohibits payments by an employer to any representative of his employees unless a specific exception in Section 302(c) applies. The exception applicable here is Section 302(c)(5) which permits trust fund contributions if precise requirements are met. Specifically, CLPT must be established "for the sole and exclusive benefit" of the employees pursuant to a written document which describes the detailed basis on which the payments are to be made.

Employers and employees must be equally represented in the administration of the fund. However, the management-appointed trustees "represent" the employer only in the sense that they should ensure that the union-appointed trustees do not abuse their trust with respect to the funds contributed by the employer. *NLRB v. Amax Coal Co.*, 453 U.S. 322, 330 n.13 (1981). In *Amax Coal*, the Court held that the fiduciaries of such plans are required to operate them for the sole and exclusive benefit of the employees regardless of the interest of the party that appointed the trustee. *Id.* at 330. The fact that the trustees are also frequently the collective bargaining representatives does not alter this statutory duty.

The CLPT trust agreement was entered into between the Laborers and several multiemployer associations. J.A. 75 at ¶ 6. Half of CLPT's trustees are selected by the Laborers and the other half are selected by the various multiemployer associations. *Id.* The employer associations consisted of the Building Industry of California, Inc., the Engineering Contractors Association, and the Southern California Contractors Association, Inc. J.A. 80 at ¶ 29. CP&P was not a contractor, has no contractor's license, and was not a member of any of these multiemployer associations at any time. *Id.* CLPT's revenue

comes from contributions from CP&P and other signatory employers, and earnings on investments. J.A. 342-343.

(2) CLPT Trustee Authority.

The CLPT trustees have broad discretionary authority in the exercise of their fiduciary responsibilities. The trustees have the power to: (a) establish, adjust, and increase pension benefits; (b) make decisions affecting CLPT administrative costs, including the hiring and firing of actuaries and administrators; (c) make investment decisions regarding plan assets; and (d) select actuarial assumptions or methods and accounting principles or methods on which CP&P's unfunded "vested" liabilities are computed and withdrawal liability calculated. J.A. 79-80, at ¶¶ 28-29; *see also Ponce v. Construction Laborers Pension Trust*, 582 F. Supp. 1310, 1312-1314 (C.D. Cal. 1984).

(3) Trust Agreement Limitations on Employer Liability.

The trust agreement specifically states that no benefits are guaranteed, and the employer's obligation is strictly limited to contributions required under the union contract. Article IV, §§ 4.07 and 4.08 of the declaration of trust for CLPT provide:

> Section 4.07. Neither the Association or (sic) any officer, agent, employee or (sic) committee member of the Associations shall be liable to make Contributions to the Fund or with respect to the Pension Plan, except to the extent that he or it may be an Individual Employer required to make Contributions to the Fund with respect to his or its own individual or joint venture operations, or to the extent that he may incur liability

as a Trustee as hereinafter provided. The liability of any Individual Employer to the Fund, or with respect to the Pension Plan, shall be limited to the payments required by the Collective Bargaining Agreements with respect to his or its individual or joint venture operations, and in no event shall he or it be liable or responsible for any portion of the Contributions due from other Individual Employers with respect to the operations of such Individual Employers. The Individual Employers shall not be required to make any further payments or Contributions to the cost of operation of the Fund or of the Pension Plan, except as may be hereafter provided in the Collective Bargaining Agreements.

Section 4.08. Neither the Associations, any Individual Employer, the Union, any Local Union, nor any Employee shall be liable or responsible for any debts, liabilities or obligations of the Fund or the Trustees.

J.A. 80-81 at ¶ 32.

The limitation on employer liability and the absence of a guarantee of pension benefits are reinforced in Article X § E(4) of the 1977-1980 Laborers' Craft Master Labor Agreement, which provides:

> The parties recognize and agree that the Pension Trust and Plan was created, negotiated, and is intended to continue to be if permitted by law under ERISA, a defined contribution plan and trust and that the individual Contractors' liability with regard to the pension has been and remains limited exclusively to payment of the contributions specified from time to time in collective bargaining agreements.

J.A. 82 at ¶ 34.

These provisions are important in assessing the extent of: (1) CLPT participants' justifiable reliance on any alleged

benefit guarantee; and (2) CP&P's commitment to make additional contributions or pay for any additional pension liabilities. *See Connolly v. PBGC*, 475 U.S. 211, 235 (1986) (O'Connor, J., concurring).

C. The Union Contract.

CP&P was signatory to a "plant" agreement which covered only those of its employees at the Shafter Facility. R. 124, CP&P Ex. 9. The union contract provisions regarding pension contributions state:

> The employer agrees to contribute the sum of $1.00 and 20/100 ($1.20) an hour for each hour worked or paid for, for each employee who works under a classification of the agreement covered by the Laborers Union Local 220. R. 124, CP&P Ex. 9, 1987 Arbitration Transcript pp. 78-79.

The CP&P agreement also incorporated terms of the Laborers' Craft Special Working Rules and Wage Scales which were contained in Appendix K to the Southern California Master Labor Agreements, which provided:

> **Important**
>
> PENSION BENEFITS ARE NOT AND HAVE NEVER BEEN GUARANTEED. THEY ARE PAYABLE ONLY TO THE EXTENT THAT THE FUND HAS ASSETS TO PAY BENEFITS. NEITHER YOUR EMPLOYER NOR YOUR UNION HAS ASSUMED ANY LIABILITY, DIRECTLY OR INDIRECTLY, TO PROVIDE MONTHLY PENSION BENEFITS. YOUR EMPLOYER'S SOLE OBLIGATION IS TO MAKE CONTRIBUTIONS CALLED FOR IN ITS COLLECTIVE BARGAINING AGREEMENT. THE PENSION PLAN HAS ALSO BEEN CONSIDERED BY THE

EMPLOYERS, THE UNION AND THE TRUSTEES TO BE A DEFINED CONTRIBUTION PLAN.

(emphasis in original) J.A. 81-82 at ¶ 33.

The collective bargaining agreement did not guarantee or specify any certain pension benefit levels for CP&P employees. J.A. 80 at ¶ 31. Thus, to the extent an employer might obtain some labor relations benefit from having guaranteed benefits promised to its employees[5], CP&P had no such benefit here.

D. Source of the Unfunded Vested Liability.

The CLPT has not been a model of operating efficiency or compliance with either Section 302(c)(5) or ERISA. During the years prior to CP&P's involvement, CLPT's trustees engaged in activities which constituted structural violations of Section 302(c). *See Ponce v. Construction Laborers Pension Trust*, 774 F.2d 1401 (9th Cir. 1985). The sources of CLPT's "unfunded" liability are chronicled in published decisions of courts in the Ninth Circuit. The Court is asked to take judicial notice of these decisions just as the arbitrator, District Court and Ninth Circuit were asked to take notice below.

CLPT had a 15-year cliff-vesting schedule for many years. Employees were required to have 15 years of essentially continuous service before becoming entitled to any benefit of any kind. *Ponce, supra*, 774 F.2d at 1402. This vesting schedule resulted in 96% of the potentially

[5] *See Keith Fulton & Sons v. New England Teamsters and Trucking Industry Pension Fund*, 762 F.2d 1124, 1129 (1st Cir. 1984), *rev'd on other grounds*, 762 F.2d 1137 (1st Cir. 1985), citing *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 18 (1976).

eligible participants in the plan being excluded from benefits. *Id.*

The gross monthly benefit was calculated by multiplying the years of credited service earned by the participant by a monthly benefit factor. The monthly benefit factors set by the trustees between June 1962 and June 30, 1980 were:

January 1, 1963	$ 2.67
July 1, 1965	$ 5.40
June 1, 1966	$11.75
December 1, 1969	$13.75
October 1, 1970	$32.40

Ponce, supra, 582 F. Supp. at 1314. The 235% increase in the value of all vested service implemented on October 1, 1970 coupled with CLPT's failure to shorten the vesting schedule was held to be a breach of the Section 302(c)(5) fiduciary duty. *See id.* at 1318, *aff'd*, 774 F.2d 1401 (9th Cir. 1985).

In 1976, CLPT made an effort to comply with ERISA and reduced its vesting schedule from 15 years to 10 years. *Ponce, supra*, 774 F.2d at 1402. This change in the vesting schedule added 10 years or more of service credits to the plan's liability for many participants. It also vested employees who might otherwise have suffered a forfeiture. The impact on CLPT's assets-to-liability ratio was obviously devastating.[6]

[6] CP&P was not created until December 1976, but it is unclear from the record whether the change in the vesting schedule occurred before or after Petitioner began contributions. This factual question is irrelevant because CP&P had no power of any kind to influence decisions by the CLPT trustees to increase benefits. J.A. 79 at ¶ 28.

The 1980 benefit increase is also significant. After the Shafter Facility closed in October 1979, no contributions were made by CP&P to CLPT other than the $48.60 contributed in May 1980. J.A. 78 at ¶ 20. The CLPT trustees increased the value of benefits from 32.40 to 35.64 (approximately 10%) for active employees as well as for retirees effective July 1, 1980. R. 124, Jt.Ex. 7E, p.3., 1988 Arbitration Transcript p. 116. At the time, CLPT's "unfunded" liability under its benefit schedule was approaching one-half billion dollars.[7] Even so, CLPT has never failed to pay any scheduled benefits to any employee, and assets continued to grow. J.A. 79 at ¶ 26; J.A. 342-343.

E. Relationship Between CP&P and CLPT.

CP&P has never exercised any kind of control or participated in management of CLPT. J.A. 79 at ¶ 28. No shareholder, officer, director, agent, or representative of CP&P has had any participation in (a) investment decisions pertaining to any assets of the trust, (b) decisions by CLPT trustees to adjust pension benefit levels, (c) decisions affecting CLPT administrative costs, or (d) the selection of actuarial assumptions or methods or accounting principles or methods upon which CP&P's asserted withdrawal liability has been calculated. J.A. 79-80 at ¶ 28.

CP&P regularly contributed to the trust from December 1, 1976 through October 1979. J.A. 76 at ¶ 10. CP&P's

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[7] The aggregate unfunded liability under its benefit schedule as of December 31, 1980 was $514,181,200.00. J.A. 79 at ¶ 27; J.A. 158.

total contributions (including the one $48.60 payment in May of 1980) to CLPT were $102,656.68. *Id.*

The 10-year vesting schedule continued during CP&P's brief association with CLPT. The three years during which CP&P contributed to CLPT were obviously insufficient for any CP&P employees to receive even one-third the number of years of service necessary to obtain a vested pension benefit.

F. Closure of the Shafter Facility.

On August 17, 1979, all production ceased as CP&P closed the Shafter Facility with the goal of relocating to a different community. J.A. 77 at ¶¶ 14 and 16. CP&P desired to relocate to Riverside or San Bernardino Counties, areas geographically closer to the Los Angeles/Orange County growth where there was a substantial demand for concrete pipe. CP&P's nine largest competitors were located in these areas. Extensive efforts were made to find a new location in Southern California which were not successful.

By October 1979, the Shafter Facility was completely shut down. J.A. 78 at ¶ 17. One hundred percent (100%) of covered operations (Laborers work) had ceased and only two full-time workers remained at the Shafter Facility, neither of whom was covered by a contract requiring contributions to CLPT. J.A. 78 at ¶ 18. The pipe manufacturing equipment was dismantled and shipped to the other plant in Sacramento. J.A. 77 at ¶ 16.

CP&P's contributions to the CLPT ceased for all practical purposes in October 1979. J.A. 78 at ¶ 17. The only exception was the May 1980 $48.60 contribution. J.A. 78 at ¶ 20.

(1) Bargaining Regarding the Closed Plant.

In April 1981, the Laborers provided notice of intention to terminate the 1978 union contract and requested negotiations for a successor contract covering the Shafter Facility. J.A. 76-77 at ¶¶ 11-12. CP&P also provided notice of termination to all unions which had contracts covering the Shafter Facility. J.A. 85-86, Ex.A to R. 49. The notice informed the unions that CP&P was willing to bargain, but the negotiations would be of little value since the plant was closed with absolutely no intention of reopening. CP&P's notice was issued in cautious regard for the possibility of a duty to bargain under 29 U.S.C. § 158(d) and the unstable law at the NLRB governing that duty as applied to employers closing or relocating plants.[8]

The principal term of the contract between CP&P and the Laborers expired on June 30, 1981. J.A. 76 at ¶ 9. The contract also provided that if negotiations for a successor agreement had not been successfully completed by that date, the contract would continue until either party gave a fifteen day notice of termination. *Id.* By November 30, 1981, the negotiations with the Laborers reached an

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[8] The NLRB's most recent standard is described in *Dubuque Packing Co., Inc.*, 303 NLRB #66 (1991). That case, in turn, repudiated a number of tests set forth in a prior NLRB decision, *Otis Elevator*, 269 NLRB 891 (1984). These cases, in turn, follow this Court's landmark decision resolving some of the controversy surrounding this issue in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). The 1981 bargaining reflects nothing more significant than a desire to avoid becoming embroiled in esoteric issues regarding the duty to bargain over a plant which had been closed for more than 20 months.

impasse. CP&P notified the Laborers that it was withdrawing recognition. J.A. 77 at ¶ 13.

CLPT asserts that this event terminated the obligation to contribute within the meaning of 29 U.S.C. § 1383(a)(1), triggering a complete withdrawal. CP&P maintains that the August 1979 complete cessation of covered operations was the withdrawal consistent with 29 U.S.C. § 1383(a)(2).

(2) The 1981 Operations.

It is clear in retrospect that had the status quo as it existed in November 1981 continued to the present, the case before this court would never have occurred. CP&P had not produced pipe at Shafter for at least 26 months and no contributions had been made for 19 months. The last CLPT contributions were made well before September 25, 1980, the date Congress enacted MPPAA.

The status quo did not continue. CP&P had been attempting to market its products and bid statewide. In November 1981, CP&P won a bid on two contracts resulting in the need to produce and deliver nearly 7,000 tons of concrete pipe near the Bakersfield, California area and very close to the site where the empty buildings which once constituted the Shafter Facility were located.

CP&P concluded that these contracts required a Southern California production site. Since the search for other sites in Southern California had proved unsuccessful, CP&P decided to create a production facility for the manufacture of concrete pipe at the previously abandoned Shafter Facility. Manufacturing equipment was hauled down from Sacramento, installed and the pipe was produced. None of this work was covered under the

union contract and no contributions were made. Subsequent to the date on which the job was completed, the facility shut down and the equipment was once again removed. CLPT claims this operation proves that the 1979 closure was not "permanent" within the meaning of 29 U.S.C. § 1383(a)(2).

G. The Withdrawal Liability Computation.

The methods for computing withdrawal liability are described in 29 U.S.C. § 1391. The only method applicable here is the presumptive formula described in 29 U.S.C. § 1391(b). First, the plan determines the unamortized amount of its unfunded vested benefits at various points in time. 29 U.S.C. § 1391(b)(1). Second, the plan determines the "employer's proportional share" of the unamortized amount of the change in the unfunded vested benefits during the specific time period. 29 U.S.C. § 1391(b)(2). The percentage resulting from this calculation is then applied against the sum resulting from the first calculation and the product is the amount CLPT charges as withdrawal liability.

(1) Calculating the Unfunded Vested Benefits.

CLPT should have no unfunded liability since no employee has been guaranteed or assured any minimum level of benefits. This fact was ignored by CLPT, which calculated withdrawal liability as if the level of benefits established in 1980 were guaranteed. In effect, this granted guaranteed benefits to the employees, a right they never achieved through collective bargaining.

a. The Actuarial Assumptions, Generally.

Computation of the unfunded vested benefits component of the withdrawal liability formulation is an actuarial process. The actuary determines the value of nonforfeitable benefits under the plan. 29 U.S.C. § 1393(c). CLPT's actuaries must use assumptions and methods which in the aggregate are reasonable (taking into account the experience of the plan and reasonable expectations) and which, in combination, offer the actuary's best estimate of anticipated experience under the plan. 29 U.S.C. § 1393(a)(1); 26 U.S.C. § 412(c)(3).

The statute contemplates issuance of regulations by the Pension Benefit Guaranty Corporation ("PBGC") identifying those assumptions which are reasonable for purposes of the calculation. *See* 29 U.S.C. § 1393(a). The PBGC has never issued those regulations.

b. The Interest Rate Assumption.

The actuarial assumption with the greatest impact on the value of "unfunded vested benefits" is the interest rate or discount rate assumption. Plan assets exist in the present, yet the payment of benefits occurs over time in the future. The interest rate assumption is the mechanism by which the comparison between the present value of plan assets and the value of vested liabilities is made possible. The interest rate assumption should represent the rate at which plan assets will grow over time. Actuaries speak of a "range of reasonableness" for this assumption.

CLPT, here, uses a blended interest rate consisting of the PBGC published rates for single-employer plan terminations for the month of withdrawal to the extent that

assets are presently available and the plan's funding rate of 6% to the extent that vested liabilities exceed assets. J.A. 246. The relationship between changes in the interest rate assumption and the impact on withdrawal liability is not proportional, but the impact is extremely significant. *See Robbins v. Pepsi-Cola Metropolitan Bottling Co.*, 636 F.Supp. 641, 675 (N.D. Ill. 1986) (decrease of 3.25% in the interest rate assumption resulted in a 26% increase in employer withdrawal liability. *Id.* at 675).

CLPT's actuary admitted that the 6% rate is on the conservative end of the reasonable range. J.A. 254. If CLPT used the Buck Forward Rates (based on the most conservative investments, U.S. Securities), withdrawal liability drops to approximately $44,000. CP&P Ex.16B, J.A. 372-374, 284. Had it applied the PBGC approved rate of 9.25%, the withdrawal liability would have been reduced from approximately $190,000 to approximately $145,000. CP&P Ex.16D, J.A. 376-377, 284.

There are other factors which play a role in the selection of actuarial interest rate assumptions. The actuary is hired by the plan's fiduciaries. As noted above, the collective bargaining parties establish the employer rate of contribution but the trustees set the benefit levels. CLPT adopted massive increases in the level of benefits, and shortened the vesting schedule. *See Ponce, supra*, 582 F. Supp. 1310, *aff'd*, 774 F.2d 1401 (9th Cir. 1985). CLPT's actuary testified that the 6% interest rate assumption was on the lower end of reasonable and was selected, in part, to fund future benefits increase. J.A. 222-223, 254. The range of reasonableness on the interest rate assumption may be the difference between a plan with no unfunded liability and a plan which is as severely underfunded as CLPT claims. J.A. 288.

(2) Calculating the Employer's Proportional Share.

The employer's "proportional share" is computed in a fraction where the withdrawing employer's contributions to the plan over the five-year period ending at withdrawal is the numerator, and all employers' contributions to the plan during the same time period is the denominator. *See* 29 U.S.C. § 1391(b)(2)(E).

The legislative history is of little help in determining why Congress decided to use a fraction describing the employer's percentage *contribution* to plan assets as a basis for determining the employer's "proportionate share" of plan *liabilities* on withdrawal. Curiously, under this formula, those who pay the highest rate of contribution for their employees (and are more likely paying for full funding) will be the very ones who must pay the highest withdrawal assessment. Indeed, the selection of this formula is peculiar given that a Senate Subcommittee had concluded that, on average, only 8% of those on whose behalf contributions are made ultimately become vested in a pension benefit. *See Ponce v. Construction Laborers Pension Trust*, 628 F.2d 537, 543 (9th Cir. 1980); *Ponce, supra*, 774 F.2d at 1403, citing "Interim Report of Activities of Private Welfare and Pension Study, Subcommittee on Labor," U.S. Senate Committee on Labor and Public Welfare (1971).

H. Arbitration Presumptions.

CLPT issued its withdrawal liability demand on January 20, 1982. J.A. 90-95. The worksheet for estimating withdrawal liability was attached to that letter. J.A. 93-94. CLPT demanded withdrawal liability in the amount of

$268,168.81.[9] The book value net worth of CP&P at the end of the year in which withdrawal liability was demanded was $417,656.58. J.A. 126, Ex. E-2 to R. 49.

The arbitration was bifurcated and conducted during 1987 and 1988. The 1987 hearing dealt with the date of withdrawal issue. The parties agreed that if withdrawal was triggered by the cessation of covered operation, which occurred before September 26, 1980, CP&P had no withdrawal liability. CLPT argued that the 1979 closing was "temporary." The arbitrator applied the 29 U.S.C. § 1401(a)(3)(A) presumption and resolved this issue against CP&P. The 1988 hearing litigated whether CLPT made errors in the withdrawal liability computation. The arbitrator applied the 29 U.S.C. § 1401(a)(3)(B) presumption. CLPT won again although withdrawal liability was reduced.

In September 1988, CP&P filed its claim under 29 U.S.C. § 1401(b) to vacate the arbitration decision. J.A. 403-408. On July 5, 1989, the District Court issued its final order. J.A. 416-427. Judge Hupp declined to find the act unconstitutional and affirmed the arbitrator's decision in its entirety. *Id.* CP&P appealed and the United States Court of Appeals for the Ninth Circuit affirmed in an

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[9] The Arbitrator held that the original withdrawal liability calculation improperly included contributions from Cen-Vi-Ro for purposes of determining CP&P's liability. Removing these contributions from the calculations reduced CP&P's percentage of the unfunded "vested" liabilities and the amount of withdrawal liability awarded was then reduced to $190,465.57. J.A. 393, 402. The District Court affirmed and CLPT did not appeal this issue to the Ninth Circuit. The withdrawal liability in this action is therefore $190,465.57.

unpublished memorandum decision and denied the petitions for rehearing and rehearing *en banc*. J.A. 431-433.

V.

SUMMARY OF ARGUMENT

CP&P mounts a three-part attack on the constitutionality of MPPAA. First, the statute is arbitrary and irrational and violates substantive due process rights of CP&P as applied. Second, the concerns expressed in the concurring opinion in *Connolly, supra*, 475 U.S. 211, are present and the statute constitutes an uncompensated taking in violation of the Fifth Amendment, as applied. Third, the statutory presumptions favoring multiemployer plans contained in 29 U.S.C. § 1401 are unconstitutional on their face and as applied to CP&P here because they deny CP&P access to an impartial decision maker.

A. The Substantive Due Process Violation.

Congress adopted MPPAA with the goal of charging the cost of funding benefits promised to a withdrawing employer's employees to that employer at the time of withdrawal. If one followed Congress's objectives in this case, no withdrawal liability would be imposed on CP&P. Neither the union contract nor the trust agreement promises any certain level of pension benefits to CP&P employees. Based on this discrepancy alone, the statute is irrational because it compels CP&P to pay sums in addition to its hourly contribution for benefits which were never promised to its employees. As importantly, CP&P contributed to the CLPT for less than one-third the time

required for any of its employees to obtain vested benefits under the Plan. CP&P should owe no withdrawal liability.

The statutory formula erroneously results in liability because it assumes that there is a proportional relationship between the amount of money an employer *pays into* the pension plan as contributions and the amount of vested *liability* it leaves behind. The formula ignores the impact of the 10-year vesting schedule and the exclusion rate.[10] CP&P contributed to the plan as though 100 percent of its employees would become vested, when, in reality, few might vest, and none in fact could based solely on employment with CP&P.

B. MPPAA Unconstitutionally Takes CP&P's Property as Applied.

MPPAA withdrawal liability provisions constitute a taking without just compensation in violation of the Fifth Amendment as applied. The effect of MPPAA as applied to CP&P is that CLPT is empowered, by operation of law, to seize assets constituting forty-six percent of CP&P's book value net worth for the purpose of funding a level of pension benefits to employees of other employers which was never promised by CP&P. MPPAA would be an improper taking without just compensation in violation of the Fifth Amendment even if it were prospective only. The fact that the statute operates retroactively here magnifies the "Takings Clause" defect.

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[10] The exclusion rate is the percentage of those participants on whose behalf contributions are made who nonetheless never receive a pension benefit due to forfeitures under the plan rules. *See Ponce*, 582 F.Supp. at 1313-1314.

C. The Procedural Due Process Violation.

Finally, the dispute resolution mechanisms of 29 U.S.C. § 1401 deprived CP&P of an impartial decision maker because the presumptions favor the plan trustees who have both structural and actual bias. This bias militates in favor of keeping the withdrawal liability assessment as high as possible. On the face of this statute, this process denies access to an impartial decision maker. As applied to CP&P, the statutory presumptions render the dispute resolution mechanism largely a futile pursuit because the presumptions as applied to the plan's various decisions are effectively unreviewable under the statutory standards.

VI.

ARGUMENT

A. Introduction.

CP&P recognizes that MPPAA comes to the Court with a presumption of constitutionality and that CP&P bears the burden of proving that the statute violates due process as applied and/or constitutes an improper taking without just compensation as applied. *See, e.g., PBGC v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984). CP&P is prepared to shoulder this burden.

The journey to determine the constitutionality of the statute as applied must inevitably take the Court into the inner workings of the Respondent multiemployer "Taft-Hartley" pension plan as it in fact operates in contrast to the way it should operate. Application of ERISA and MPPAA to CP&P by the lower courts results in requiring CP&P to tender over $190,000 plus interest to CLPT for

the sole purpose of protecting the PBGC from having to pay off on the pension insurance.

It cannot be reasonably disputed that the money sought from CP&P is "property" under accepted constitutional definitions. *See Sniadach v. Family Finance Corp.*, 395 U.S. 337, 340 (1969). The physical, tangible assets owned, possessed, and used by an employer in the operation of its business are "sufficiently bound up with the reasonable expectations of [the employer] to constitute 'property' for Fifth Amendment purposes." *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 125 (1978). Such assets, whether in the form of liens, trade secrets, or cash are recognized as property by opinions of this Court. E.g., *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003-1004 (1984) (recognizing a Taking Clause property interest in trade secrets); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160, 164 (1980) (expressly stating that, for Taking Clause purposes, "[t]he principal sum deposited in the registry of the court plainly was private property" *Id.* at 160); *Baltimore & Ohio Railroad Co. v. United States*, 345 U.S. 146, 148 (1953) ("[s]o long as a railroad is not caused by such regulations *to lose money on its over-all business*, it is hard to think that it could successfully charge that its property was being taken for public use 'without just compensation'." *Id.* at 148) (emphasis added).

"Property" may take the form of trade secrets, or may be in the form of money, as in *Webb's Fabulous Pharmacies* and *Baltimore & Ohio Railroad*. Whatever the form, these assets are property, with respect to which their owners exercise "the right to *possess, use* and *dispose* of [them]," *Monsanto, supra*, 467 U.S. at 1003, quoting *United States v. General Motors Corp.*, 323 U.S. 373, 377-378

(1945) (emphasis added), as well as the right to exclude others from their possession, use, or disposition. *See Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) ("right to exclude others" is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Id.* at 176).

The required transfer of property under MPPAA from a withdrawing employer to a multiemployer trust has previously been addressed by this Court in facial challenges. *See PBGC v. R.A. Gray & Co., supra*, 467 U.S. 717, and *Connolly v. PBGC, supra*, 475 U.S. 211. Each of these challenges was unanimously rejected; however, a well-reasoned concurring opinion in *Connolly* recognized that the actual application of MPPAA may violate the Fifth Amendment rights of some employers. All of the possible infirmities cited in the concurring opinion, plus a few additional factors, are present in this "as applied" case.

Both *Gray, supra*, and *Connolly, supra*, discussed standards previously applied in substantive due process and takings cases. Specifically, the Court analyzed the cases under both an "arbitrary or irrational" standard and the three-part "Takings" analysis stated in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). No definitive determination of whether one analysis is more appropriate than the other is apparent in these decisions. Resolution of that issue is not necessary here since the application of MPPAA to CP&P violates the Fifth Amendment under either standard.

CP&P also challenges the MPPAA dispute resolution mechanism as a denial of procedural due process on its face and as applied here. The constitutional issues associated with the 29 U.S.C. § 1401 (1980) presumptions were

fully briefed and argued to the Court in the 1987 facial challenge to the statute, resulting in an affirmance by an equally divided court. *PBGC v. Yahn & McDonnell, Inc.*, 481 U.S. 735 (1987). CP&P contends that the statute is unconstitutional on its face and as applied here, and accordingly the presumptions should be stricken.

The starting point for this analysis is the goal Congress attempted to achieve with MPPAA and a comparison of that goal with the means used to attempt to achieve it.

B. The Congressional Goal.

The purpose of the pension funding provisions of ERISA is well-chronicled in the Court's decisions. *See Connolly v. PBGC, supra*, 475 U.S. 211 (*"Connolly"*); *PBGC v. R.A. Gray & Co., supra*, 467 U.S. 717 (*"Gray"*); *Nachman Corp. v. PBGC*, 446 U.S. 359 (1980) (*"Nachman"*). The Court has noted:

> Congress wanted to guarantee that 'if a worker has been promised a defined pension benefit upon retirement – and if he has fulfilled whatever conditions are required to obtain a vested benefit – he will actually receive it.'

Connolly, 475 U.S. at 214. An integral part of the benefit protection was the creation of a wholly owned government corporation, the Pension Benefit Guaranty Corporation ("PBGC"), to administer the insurance program for participants of single employer and multiemployer pension plans. *Id.* at 214; 29 U.S.C. § 1302 (1989). PBGC coverage of multiemployer plans like CLPT was initially delayed for a number of years due to concerns that mandatory benefit guarantees by PBGC might induce several

large plans to terminate, thus subjecting the PBGC insurance system to liability far beyond its means. *Connolly*, 475 U.S. at 215.

If PBGC insurance was intended to encourage plan fiduciaries to act more responsibly and conservatively in adjusting benefits and managing plan assets, the statute had the opposite effect. Two-thirds of all multiemployer plans surveyed by the PBGC increased the value of benefits in the months before MPPAA became effective with nearly half increasing retiree benefits also. *See* G.A.O./HRD 85-58, Comptroller General's Report to the Congress, Effects of the Multiemployer Pension Plan Amendments Act on Plan Participants' Benefits, 43, App. I, Table 17, 18. CLPT's 235% increase in 1976 and additional 10% increase in 1980 was consistent with the G.A.O. study.

By 1978 Congress had recognized the enormity of the problem which it created. Through ERISA, Congress had effectively shifted the entire economic burden and risk of private pension plan underfunding to the federal government d/b/a the PBGC. Congress responded to this crisis by directing the PBGC to make a report analyzing the problems of multiemployer pension plans and recommending possible solutions. *See* S. Rep. No. 95-570, pp. 1-4 (1977); H.R. Rep. No. 95-706, p. 1 (1977).

The PBGC's solution was a new set of rules, "under which a withdrawing employer would be required to pay whatever share of the plan's unfunded liabilities was attributable to that employer's participation." *Connolly*, 475 U.S. at 216. Congress debated the withdrawal liability from 1979 through most of 1980. Indeed, the debate continued for several months following the date on which CP&P made its last contribution to CLPT. Ultimately, legislation became effective on September 26, 1980 in the

form of MPPAA which adopted the recommendations in the PBGC's report. *Connolly*, 475 U.S. at 217.

C. The Substantive Due Process Issue.

The Court described its framework for analyzing whether this statute is so arbitrary or irrational as to violate due process in *Gray, supra*, 467 U.S. at 729-730. Statutes adjusting the burdens and benefits of economic life are presumed to be constitutional, and CP&P has the burden of proving that Congress acted arbitrarily or irrationally. *Id.* at 729, quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976).

Congress does not, however, possess unlimited power to readjust rights and burdens and upset otherwise settled expectations. *Turner Elkhorn, supra*, 428 U.S. at 16-17. A legislature must do more than assert that contested law is for the public good to convert private property into public property without compensation. *Lucas v. South Carolina Coastal Council*, ___ U.S. ___, 1992 W.L. 142517, *11 (June 29, 1992). Furthermore, where legislation has a retroactive effect, the legislation must meet a higher burden than a statute with merely prospective impact. *Gray*, 467 U.S. at 730. The effect on CP&P here was quite clearly retroactive.

As recognized in *Connolly, supra*, 475 U.S. at 216, Congress enacted MPPAA to require withdrawing employers to fund the part of the plan's unfunded liabilities attributable to that employer's participation. Unfortunately, the formula adopted by Congress imposes liability on employers regardless of whether the plan's liabilities are attributable to the withdrawing employer.

CP&P did not promise any defined benefit to an employee and none of the unfunded liability is attributable to it. Rather, it is being compelled to tender its assets to CLPT for the benefit of the PBGC and employees of other employers. CP&P did not cause this liability. Rather, the liability, if it exists, was caused by CLPT's trustees and other employers (before CP&P started contributing and after it ceased). In essence, MPPAA, as applied, forces CP&P to pay the obligations of others in the hope that the PBGC can avoid liability for the guarantees and insurance provisions imposed upon it by the 93rd Congress. It is arbitrary and irrational to solve the PBGC's problem with CP&P's assets since there is no relationship between CP&P's conduct and any detriment to its employees. *See Connolly, supra*, 475 U.S. at p. 229 (O'Connor, J., concurring).

(1) There Are No Promised Benefits In This Plan To Protect.

The cornerstone of MPPAA is the protection of promised benefits yet there are no promised benefits in this case. The two key documents for this analysis are the collective bargaining agreements between CP&P and the Laborers, and the CLPT trust agreement.

CP&P's collective bargaining agreement limits its liability to $1.20 per hour worked and does not guarantee any of its employees a level of pension benefits on retirement. R. 124, CP&P Ex. 9, 1987 Arbitration Transcript p. 78. The CLPT trust agreement affirms that the employer's liability is limited to its contributions under the union contract and that no participant or beneficiary in the pension plan can or should have any expectation that any benefit level is guaranteed. J.A. 80-82.

Thus, if MPPAA had a purely prospective impact, its stated purpose would not justify the intrusion into CP&P's property interests because the ill which Congress sought to cure does not exist as there are no benefits promised to either CP&P's employees or to any other participant under the terms of the CLPT plan. On this basis alone, the statute should be stricken as applied to Petitioner here.

(2) The Statute is Arbitrary and Irrational Because CP&P's "Proportional Share" of the Liabilities Should Be Zero.

Under the best set of facts conceivable for CLPT, CP&P could not have contributed on behalf of any of its employees for more than three years. At the same time, CLPT had a ten-year "cliff" vesting schedule. The potential liability for those employees with less than ten essentially continuous years of service was not "vested liability." Under the circumstances, CP&P's withdrawal liability should be zero because none of its employees participated long enough to have any "vested service" attributable to employment at CP&P. Accordingly, CP&P's "proportional share" of unfunded vested liability is logically zero.

Nonetheless, MPPAA as applied here results in withdrawal liability of more than $190,000 even though CP&P already paid $102,656.68 for benefits which none of its employees received. The withdrawal liability calculation arbitrarily and irrationally results in an imposition of withdrawal liability on CP&P even though none of the stated purposes of MPPAA are served and none of the "evils" associated with employer withdrawal from multi-employer plans is present.

(3) The Withdrawal Liability Calculation Formula Is Also Arbitrary and Irrational As Applied.

One problem with the withdrawal liability statute as applied to CP&P is that the formula proceeds from a faulty premise linking contributions and vested liability. The premise is irrational as applied for two reasons. First, the formula fails to take into account the impact of normal exclusion rates and vesting schedules in Taft-Hartley pension plans on short-term employers like CP&P. Second, the more an employer contributes to CLPT to fund its employees' benefits, the more it must pay at withdrawal to fund benefits for employees of others.

The first flaw in using a contribution ratio to calculate a proportional share of liability is that it fails to take into account the impact of the vesting schedule. If, as here, an employer contributes for less than the number of years required for any of its employees to become vested in the plan, the plan's vested liabilities attributable to that employer should not increase because of that employer's conduct. Nonetheless, the MPPAA formula as applied here resulted in a substantial withdrawal liability assessment against CP&P.

The other peculiar characteristic of this formula, as applied, is that the more an employer contributes, the more withdrawal liability it owes if it withdraws. For example, CP&P contributed $102,656.68 during the five-year period ending December 31, 1979 at the rate of $1.20 per hour. J.A. 76 at ¶10. Its percentage of total CLPT contributions for the period ending December 1979 was therefore .000375276. CP&P Ex.16(B), J.A. 372-374, 284. Had CP&P, through unsuccessful bargaining or a weak negotiating position, been compelled to pay twice that

amount, i.e., $2.40 per hour, its withdrawal liability percentage doubles from .000375276 to .000750271.[11] Application of this fraction to the pension fund's pre-MPPAA aggregate unfunded vested liability of $468,656,500[12] would cause the CP&P withdrawal liability assessment to increase from $175,875.56 to $351,619.38. Thus, had CP&P doubled its hourly contribution and improved the plan's assets-to-liability ratio, its reward would be a demand to double its withdrawal liability![13]

The withdrawal liability calculation formula as applied punishes those employers who increase their contributions to the plan by making it even more expensive to withdraw from the plan even though the effect of the contributions has been to increase assets without increasing liabilities. The "more you pay the more you owe" approach which results from the withdrawal liability formula is not consistent with requiring an employer to pay only its fair share of the vested liability at withdrawal. By requiring CP&P to pay more than its fair share, the formula requires CP&P to pay liabilities of other employers so that other citizens (employees of other employers) can receive retirement benefits. There is

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[11] This number is derived by dividing $205,313.36 into $273,652,356.68, i.e. CP&P's contributions and the aggregate contributions on behalf of all employers are increased by exactly $102,656.68 from what actually occurred.

[12] This number is for the December 1979 unfunded liability pool only. *See* J.A. 94-95, Ex.D. to R. 49.

[13] Petitioner recognizes that the $102,656.68 additional contribution would have some effect on the value of the unfunded vested benefits but it would not materially affect the resulting liability.

no rational basis to require one citizen to fund the pension of another citizen where no relationship between the two ever existed.

(4) The Statute is Unfairly Retroactive as Applied.

The portion of the withdrawal liability attributable to the unfunded liability of the plan prior to the effective date of MPPAA is unquestionably retroactive as applied to Petitioner. The one-half billion dollar unfunded liability is largely attributable to the 1970 breach of fiduciary duty described in *Ponce, supra*, 774 F.2d 1409, and the trustees' 1976 decision to reduce the required number of years before a participant vested in the plan from 15 years to 10 years.

The gross benefit increase of 235% increase in 1970 (pre-CP&P) and additional 10% increase in 1980 (post-CP&P) were significant in creating the unfunded liability. These increases applied to both active and retired participants without regard to employer funding. The result was a massive decrease in the assets-to-liability ratio in the plan which occurred before and after CP&P contributed to the plan. Assessing CP&P for the alleged liability resulting from events before it entered the CLPT is not only retroactive but also compels this employer to pay for pensions of employees wholly unrelated to it.

Also, CP&P closed its plant, laid off its employees and made its last contribution to CLPT prior to the passage of MPPAA. By these actions it had committed to a course of action that resulted or should have resulted in withdrawal before the passage of MPPAA. The subsequent application of MPPAA to these facts indisputably constitutes a retroactive application of the statute to CP&P. Since a retroactive statute must meet a higher

burden than a statute with merely prospective impact, *Gray, supra*, 467 U.S. at 730, this statute, as applied, falls well below the minimum due process requirements imposed by the Fifth Amendment.

D. The Withdrawal Liability Assessment is a Taking as Applied.

CP&P also challenges the withdrawal liability assessment on the grounds that MPPAA perpetrates an uncompensated taking against Petitioner in violation of the Fifth Amendment. Uncompensated expropriation of private property for public use has been held unconstitutional in a variety of contexts. *E.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (use of landlord property for attachment of cable television lines is compensable taking); *Webb's Fabulous Pharmacies, supra*, 449 U.S. at 163 (Florida's appropriation of interest on monies deposited with the registry of the court was a compensable taking); *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951) (President's seizure and operation of a coal mine constituted a compensable taking).[14]

The constitutional infirmity is not avoided by legislation directing CP&P to deliver its money to CLPT. In fact

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[14] It should be noted that takings have frequently been found in contexts in which the property in question has been subject to substantial prior regulation, as in the area of security interests. *E.g., Armstrong v. United States*, 364 U.S. 40 (1960) (taking of materialman's lien); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935) (taking of mortgagee rights in property held as security); and *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) (mining rights). Prior regulation cannot justify subsequent legislation which rises to the level of taking without just compensation.

it is impermissible for legislation to require the delivery of one person's property to another person without a justifying public purpose even if compensation is paid. The Court has stated in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241 (1984) as follows:

> To be sure, the Court's cases have repeatedly stated that "one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid." (Citations omitted.). . . .

As the Court noted in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), although property may be regulated to a certain extent, if the regulation goes "too far," it is a taking.

(1) The *Lucas v. South Carolina Coastal Council* Analysis.

More recently, the Court recognized that the cases since *Mahon* have offered little insight as to when and under what circumstances a given regulation would be seen as going "too far" for purposes of the Fifth Amendment. *Lucas v. South Carolina Coastal Council*, ___ U.S. ___, 1992 W.L. 142517, *6 (June 29, 1992). Subsequent to *Mahon*, "[the court had] generally eschewed any 'set formula' for determining how far is too far, preferring to 'engage in . . . essentially *ad hoc*, factual inquiries.' " *Id.*

The Court in *Lucas* noted that there were "at least" two discrete categories of regulatory action which were compensable takings without case-specific inquiry into the public interest advanced in support of the restraint. *Id.* Both of these categorical takings apply in the context of disputes over the use of real estate or real property. The Court's notation that it had described "at least two

discrete categories of regulatory action as compensable without case-specific inquiry" suggests that its decision in *Lucas* may be applicable beyond the relatively narrow area of land-use regulation.

(2) The *Connolly v. PBGC* Analysis.

In *Connolly, supra*, 475 U.S. 211, the Court reaffirmed that it has not established any set formula for identifying a "taking" forbidden by the Fifth Amendment, and has relied instead on *ad hoc*, factual inquiries into the circumstances of each particular case. *Id.* at 224. The Court identified three factors which were of "particular significance" in determining whether an uncompensated taking in violation of the Fifth Amendment had occurred. Those factors are:

(1) The economic impact of the regulation on the claimant;
(2) The extent to which the regulation has interfered with distinct investment-backed expectations; and
(3) The character of the governmental action.

Id. at 225, citing *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978). The concurring opinion in *Connolly* suggests that a regulation that completely deprives a withdrawing employer of its property to fund pension benefits for employees of other employers without regard to the withdrawing employer's conduct may be an additional category where compensation for the taking is required. *Connolly*, 475 U.S. at 228-236.

Given the recency of the *Lucas* decision and the uncertainty regarding its application to this case, CP&P will analyze the Takings Clause under both the *ad hoc* factors which this Court noted in *Connolly*, and the *Lucas* categorical approach.

(3) The Withdrawal Liability Statute as Applied to CP&P Constitutes a Taking Based on the *Ad Hoc* Factual Analysis.

Much of the legal analysis required to examine this case under the *ad hoc* factual approach to the Takings Clause issue was performed by this Court in *Connolly*. The primary difference is that in *Connolly* the Court was examining whether the statute would constitute a taking in all circumstances. Here, however, the issue is whether the statute constitutes a taking as applied to CP&P.

a. The Economic Impact of the Regulation on Petitioner.

The economic impact of the withdrawal liability assessment on CP&P is devastating. CP&P's shareholder equity at the end of the year of withdrawal was $417,656.58. J.A. 126. The withdrawal liability assessment of $190,465.57, J.A. 393, 402, represents approximately 46% of that equity. This is an extremely severe impact.

The withdrawal liability assessment here is made without regard to the relationship between CP&P and CLPT. CP&P had no managerial responsibility for this plan. None of its employees vested because of their service with CP&P exclusively. The unfunded vested liability was caused by benefit increases and changes to the vesting schedule which occurred prior to CP&P's creation and well after the date on which the last contribution by this employer was made to the plan in 1980. This factor weighs heavily in favor of CP&P.

b. Interference With Distinct Investment Backed Expectations.

This factor also heavily favors the finding of a "taking" as applied here. CP&P's reasonable investment backed expectations were described in the union contract and trust agreement. Both documents stated that CP&P's obligation to contribute under the union contract was the extent of its obligation to fund pension benefits and that obligation was limited to funding pensions for its own employees. Indeed, the trust document itself described the plan as being a defined contribution plan to which no withdrawal liability could ever be imposed. It was not until well after CP&P's 1979 complete cessation of covered operations that this Court issued its decision in *Nachman, supra,* 446 U.S. 359, in which the defined contribution status of this plan became questionable.

The employees, through their union, and the employer entered into a contract through which CP&P would pay $1.20 of the total compensation package to CLPT. CP&P made no promises of specific benefit to its employees. In reliance on this agreement, CP&P priced its goods – concrete pipe – and sold those goods to recover the total cost of labor and earn a competitive profit. CP&P reasonably expected that these transactions were final. The employees had no reasonable expectations to the contrary. The payment of $1.20 per hour to CLPT was the entire extent of the agreement regarding pensions.

MPPAA effectively re-opened the negotiations, retroactively established promises of benefits where none had previously existed, and increased CP&P's labor cost retroactively on contracts CP&P performed in the past. When CP&P closed the plant in 1979 MPPAA did not exist. The ERISA contingent liabilities were substantially

different in scope from the liabilities of MPPAA so that CP&P had no reasonable notice that 46% of its net worth would be seized. CLPT never failed to pay any recognized benefits when due and its assets continued to grow. J.A. 79 at ¶26; J.A. 342-343. Any risk of a liability under pre-MPPAA ERISA was extremely remote. This remote contingency certainly did not put CP&P on notice that withdrawal might result in seizure of nearly half its net worth.

c. Character of the Governmental Action.

The property of CP&P which is taken, is taken in its entirety. The withdrawal liability scheme, as this Court has observed, was enacted because the PBGC insurance program created by ERISA in 1974 encouraged withdrawals which threatened to foist on the PBGC liability in excess of its resources. Thus, Congress enacted the withdrawal liability scheme as a direct effort to shift the funding liability for the private pension insurance system from the PBGC to withdrawing employers. The liability assessed here is pension liability for employees of entities other than CP&P. The vast majority of the unfunded liability was created before CP&P's creation, and no CLPT employee participated long enough to vest based upon employment at CP&P.

Consider the case of the CLPT participant who retired in 1969 with thirty years of vested service. At retirement, the gross annual pension liability to him was $4,950.00 (30 x $13.75[15] x 12). After the 1970 benefit increase the liability for this retiree jumped to $11,664.00

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[15] *See, Ponce,* 582 F.Supp. at 1314.

based on the same formula. The 1976 change to the vesting schedule increased the number of individuals like this sample retiree. In 1980, after CP&P made its last contribution the benefits were again increased by CLPT trustees and the gross benefit for this retiree jumped to $12,830.40. Because this participant was retired, no additional contributions were received by CLPT based on hours he worked. Thus, for each similarly situated retiree (and the number of years those retirees receive benefits) the trustees of CLPT have created additional liability at the rate of $7,880.40 per year with no additional funding.[16] CP&P did not exist when these participants earned their service credits and did not make the decision to increase benefits or select those that did.

Thus, the statute, as applied, takes CP&P's assets and compels it to be paid into CLPT for the sole purpose of protecting the PBGC from being forced to honor its pension insurance. This kind of shifting of a public burden to a private entity is precisely the kind of legislation which the Takings Clause was designed to preclude.

Each of the concerns expressed in the concurring opinion in *Connolly*, are present in this case. Application of the three factor *ad hoc* factual approach in *Connolly* to the circumstances in this case demonstrates that ERISA and MPPAA cause an uncompensated taking in violation of the Fifth Amendment as applied to CP&P.

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[16] The magnitude of the impact of these benefit increases was far greater than even this example suggests. It must be remembered that all vested service of all participants in the plan was increased.

(4) The Categorical Taking.

In *Lucas v. South Carolina Coastal Council, supra*, the Court described at least two discrete categories of regulatory action which were, by definition, compensable takings which did not require a case-specific inquiry into the public interest advanced in support of the restraint. Unlike *Lucas*, this case deals not with real property but rather with economic regulation.

Lucas is instructive. In fact, CP&P finds itself in a worse position than Mr. Lucas vis-a-vis the impact on property. Lucas complained that the land-use regulation deprived him of all reasonable uses thereby stripping all economic value from the property. Here CP&P is to be deprived of approximately 46% of its book net value permanently and without any compensation. Had the statute in *Lucas* been upheld, the landowner could still have built a patio and walkway, and enjoyed the view from his beach. Here, if the statute is upheld, CLPT seizes the assets and CP&P retains no property interest in the seized assets.

The taking here goes beyond that found unconstitutional in *Lucas*. As the Court noted, the fact Congress claimed a taking was for the public good does not make the taking any less unconstitutional. The harm here also goes beyond that of CP&P's shareholders. The taking in *Lucas* was personal to the landowner, but so too was the scope of the injury. Forced liquidation of CP&P's assets and payment of the proceeds to CLPT to fund pensions for employees of others impacts the current Sacramento employees of CP&P. If the assets are seized and the remaining plant closed it will be of little solace that their jobs and income were lost for the "public good" of protecting the PBGC and funding the pensions of others who

live hundreds of miles south. MPPAA, as applied, inflicts far too much havoc and takes too much from too many to be anything other than a taking requiring compensation under the Fifth Amendment as applied to CP&P.

E. The Statutory Presumptions Violate the Due Process Clause by Denying Access to an Impartial Decision Maker.

Those acting in judicial or quasi-judicial capacity are disqualified by their interest in the controversy from deciding the case. E.g., *Tumey v. Ohio*, 273 U.S. 510, 522 (1927). Although each decision maker begins with an initial presumption of impartiality, that presumption can be rebutted by a showing of conflict of interest or some other specific reason for disqualification. *Schweiker v. McClure*, 456 U.S. 188, 195 (1982). CP&P bears the burden of rebutting this presumption, but that burden is carried if it proves that the CLPT trustees are potentially subject to disqualifying interest. CP&P is not required to prove the decision maker was actually biased. *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 825 (1986).

The disqualifying interest can be directly pecuniary. *See Gibson v. Berryhill*, 411 U.S. 564, 579 (1973). It can also occur where a quasi-judicial function is combined with statutory duties to create a "possible temptation" for the decision maker to decide a question based on the bias rather than the facts. *See Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972).

The statutory presumptions contained in 29 U.S.C. § 1401 deny CP&P and all withdrawing employers the right to procedural due process in the form of an impartial decision maker. There is no neutral and detached

judge in the first instance, a constitutional infirmity recognized by the Court in *Ward, supra*, 409 U.S. at 61-62. The presumptions also preclude the possibility for a *de novo* review by an impartial and disinterested panel, an omission which the Court implicitly condemned in *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242-248 (1980).

(1) CLPT Trustee Bias is Structural and has Manifested Itself on Several Occasions in This Case.

The existence of trustee bias in the withdrawal liability dispute mechanism is structural and its impact is easily identified in this case. Both under Section 302 of the Taft-Hartley Act and ERISA the fiduciaries owe an unwavering duty of complete loyalty to the beneficiaries of the trust to the exclusion of all interests of all other parties. *See NLRB v. Amax Coal Co.*, 453 U.S. 322, 329-30 (1981); 29 U.S.C. § 1104. The ERISA fiduciary duty is even more exacting than the requirements of the common law of trusts relating to employee benefit plans. *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 148 n.17 (1985). Indeed, the trustees are personally liable to the fund for a breach of the statutory fiduciary obligations. 29 U.S.C. §§ 1109 and 1132.

It is significant that the employer trustees of the fund, in addition to their capacity as fiduciaries, are competitors of withdrawing employers like CP&P. The Court has held that employee benefit contributions can be inappropriately used in multiemployer plan situations to achieve unlawful anti-competitive goals. *See United Mine Workers v. Pennington*, 381 U.S. 657, 665-666 (1965).

CLPT's employer-appointed trustees have an interest in forcing competitors to incur the cost of contribution to the pension trust. It is also in their best interest to fund

the trust from the assets of withdrawing employers so that no unfunded liability will exist should their business later withdraw. The union trustees' interests are contrary to allowing employers to withdraw from the plan. Clearly, the specter of enormous liability is a deterrent to pushing the employer's bargaining position. The union, the continuing employers and the CLPT trustees benefit from actuarial assumptions which maximize withdrawal liability. J.A. 290.

The plan actuary serves at the tolerance of the plan trustees. Actuaries recognize (as the actuary for CLPT recognized) that the trustees tend to increase benefits regardless of changes in the level of contributions. Actuaries select extremely conservative interest rate assumptions which tend to maximize the apparent unfunded liability to deal with this contingency.

The fiduciary's obligations virtually guarantee that the trustees will exercise every opportunity to maximize the assets available to the pension plan including maximizing the recovery of withdrawal liability. The legislative history demonstrates this point through statements by Senator Harrison Williams, co-sponsor of ERISA and MPPAA:

> We do not intend to restrict plan sponsor's prudent exercise of judgment in administering the withdrawal provisions generally. It is expected that plan trustees will need to make practical collection decisions which are consistent with their fiduciary duties and characteristic of any responsible creditor concerned with maximizing the total ultimate recovery at supportable cost. 126 Cong. Rec. 23,288 (1980).

Congress believed that the failure to maximize withdrawal liability was not a *per se* violation of fiduciary

duty.[17] However, the fact that it can be a violation of the fiduciary duty, at all, destroys any neutral or detached quality to the fiduciary decision making.

CLPT's trustees have demonstrated their bias in this case. CLPT's actuary testified that the interest rate assumptions are deliberately conservative (thereby maximizing withdrawal liability) with the goal of funding future benefit increases for participants in the plan. J.A. 222-223. CLPT tried to inject the contributions history of a completely separate employer, Cen-Vi-Ro, into CP&P's contribution base for the deliberate purpose of increasing the amount of withdrawal liability. Indeed, the 1980 benefit increase was directly at the withdrawing employer's expense. The CLPT trustees' bias cannot be seriously disputed in this case particularly since CP&P did not even have the minimal protection of membership in any of the employer associations which select the CLPT trustees.

(2) The Statutory Presumptions of Fiduciary Infallibility Provide the Mechanism for the Trustees to Effectuate Their Bias.

The three presumptions in the dispute resolution process[18] when coupled with the subject matter inherent in withdrawal liability calculation imbue the trustees with the virtually irresistible power to bring their bias to bear on withdrawing employers. Under the first presumption, 29 U.S.C. § 1401(a)(3)(A), the trustees' determination regarding the date of withdrawal was presumed correct

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[17] H.R. Rep. No. 869, pt. I, 96th Cong., 2d Sess. 67, reprinted in 1980 *U.S. Code Cong. & Admin. News* 2918, 2935.

[18] *See* 29 U.S.C. § 1401(a)(3)(A), (a)(3)(B) and (c).

unless CP&P was able to prove by a preponderance of the evidence that the determination was unreasonable or clearly erroneous. Thus, CLPT was permitted to have its clairvoyance on whether the 1979 cessation of operations was "permanent" upheld as fact. The CLPT ignored a plant closure which would otherwise have triggered withdrawal until such time as the trustees decided that it suited their purpose to impose the liability. They did so in this case in such a fashion as to drag CP&P from the pre-MPPAA era across time and past the effective date of the statute to a point where withdrawal liability could be imposed.

Under the second presumption, 29 U.S.C. § 1401(a)(3)(B), the plan's determination of its own unfunded vested benefits is correct unless the withdrawing employer can prove that the actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable, or that the plan's actuary made a significant error in applying the actuarial assumptions or methods.

Here, it is the combination of the range of permissible activity coupled with the presumption which effectively precludes any review of the unfunded vested benefit calculation. As demonstrated both in *Keith Fulton*[19] and Exhibits 16A through D in the arbitration[20], the range of actuarial assumptions which may be potentially reasonable results in wide swings in the withdrawal liability.

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[19] *See Keith Fulton & Sons v. New England Teamsters and Trucking Industry Pension Fund*, 762 F.2d 1137, 1150 (1st Cir. 1985). (Aldrich, J., dissenting.)

[20] J.A. 371-377.

Given the trustees' bias in favor of maximizing plan assets, it is not difficult to understand why CLPT's trustees' actuary admittedly fixed actuarial assumptions on the conservative end of the spectrum. J.A. 222-223. When an actuarial firm so dominates the market in serving multiemployer plans that it boasts that, in that particular market for services, it is first and "no one is second," the withdrawing employer's task is rendered impossible. J.A. 255. The plan proclaims its assumptions to be within the range of reasonableness and verifies this fact by opinion testimony from its paid actuary who claims that most actuaries in the field (i.e. those employed by the same firm and those which defer to it) agree his assumptions are reasonable. Absent a soul cleansing confession by the actuary (which would likely result in the termination of his contract), attack on the actuarial assumptions is virtually impossible.

The third presumption effectively seals the withdrawing employer's fate. Under 29 U.S.C. § 1401(c) after the arbitrator has applied the presumptions described above, the District Court will find that the employer failed to meet his burden of proof in overcoming the presumption unless a clear preponderance of the evidence is to the contrary. The withdrawing employer is left to ponder the 20th Century equivalent of the Sphinx's riddle (the meaning of the term "clear preponderance of the evidence"), uncertain of its meaning but clearly understanding that the burden imposed will be insurmountable. CP&P never had a fair hearing before a decision maker which was not directly biased against it.

(3) CLPT's Decision in Computing, Assessing and Collecting Withdrawal Liability is Adjudicative in Nature.

Withdrawal liability is a debt which is a creature of the MPPAA. The unique feature of the statute is that the plan which seizes the employer's assets decides: (1) if it is underfunded, (2) whether CP&P owes the debt, and (3) how much the debt will be. CLPT performs all these functions cloaked in presumptions that its determinations are correct.

All of these decisions are conducted solely and exclusively for the purpose of bringing them forward in the dispute resolution mechanism to collect money from withdrawing employers either through voluntary payment or through the 29 U.S.C. § 1401 dispute resolution mechanism. But for the dispute resolution mechanism or the opportunity to invoke it, the computation of the debt would never occur.

The trustees in making this computation, are deciding the amount of the employer's "proportional share" or "fair share" of the plan's unfunded liability. This decision making process usually results in resolving all disputable issues. Assessment of liability is necessarily adjudicative.

(4) The Breadth of "Reasonable Actuarial Assumptions" Renders the Statutory Presumptions Unconstitutional.

The range of reasonable interest rate assumptions during the time period in question has been described by at least one actuary as being between 7.5 percent and 14.5

percent per year.[21] That "range," coupled with the incentive of all those on the CLPT side of this dispute to maximize withdrawal liability, render the statute unconstitutional because the range of acceptable actuarial assumptions coupled with the presumptions permits the seizure of assets when there may be no objective unfunded vested liability.

CLPT can manipulate the process to such an extent that neither the PBGC nor Congress may ever gain an objective assessment of the private pension plan funding system. For example, if the interest rate assumptions used by the plan are accepted, the Court must assume that the unfunded "vested" liability of this plan as of the last year prior to the effective date of MPPAA was approximately $468,656,500. J.A. 94. However, if the plan actuary had applied the "Buck Forward Interest Rates" which are based upon essentially zero risk U.S. government securities, the plan's unfunded vested liability for the December 31, 1979 withdrawal liability pool decreases by more than 38 percent and $179,870,318. Clearly, the Buck Forward Interest Rates do not approach the 14.5 percent rate which the actuary in *Keith Fulton* found reasonable. The important aspect of the interest rate flexibility is that fundamentally it is a matter of what one chooses to believe about future trends in investment performance. Beliefs protected by presumptions are effectively irrebuttable.

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[21] *Keith Fulton, supra*, 762 F.2d at 1150 (Aldrich, J., dissenting).

(5) The Statutory Presumptions Deprive Withdrawing Employers of Due Process Because They Never are Able to Obtain a Trial Before a Neutral and Detached Decision Maker.

Due process requires a neutral and detached judge in the first instance and even *de novo* review does not remedy the failure to provide such opportunity. *Ward, supra,* 409 U.S. at 60-61. The presumptions here are unique and do not deal with evidence but rather conclusions from evidence. Thus, they are not factual presumptions but rather presumptions of decision maker infallibility.

Congress was admittedly attempting to limit an employer's ability to defend itself against a withdrawal liability assessment. The withdrawal liability assessment was intended to be collectible upon notice and demand without prior hearing. H.R. Rep. No. 869, pt. II, 96th Cong., 2d Sess. 29, reprinted in *1980 U.S. Code Cong. & Admin. News 2993, 3018.* The requirement for interim withdrawal liability payments while the employer attempted to litigate the dispute is indicative of the "collect first and answer questions later" approach which Congress implemented.[22]

Thus, the statutory presumptions in MPPAA are not evidentiary presumptions but are instead presumptions regarding who makes better decisions. The problem is that the presumption that the plan makes better decisions, coupled with (1) the trustees' inherent bias and (2) the available mechanisms through which they can inflate with the unfunded liability calculation, have the inevitable effect of permitting CLPT to decide how much of an

[22] *See* 29 U.S.C. § 1401(d).

employer's assets it wishes to take without fear of close scrutiny on review.

The statutory presumptions go further than is necessary to achieve Congress' legitimate purpose of deterring frivolous litigation. The potential for interim withdrawal liability payments during the pendency of the dispute[23] is a significant deterrent to contesting a withdrawal liability assessment. Similarly, the knowledge that, if the employer loses, an award of attorneys' fees is virtually inevitable under 29 U.S.C. §§ 1132(g)(2) and 1451(b) and (e) is likewise a significant deterrent to either frivolous attacks or delaying tactics by the withdrawing employer. The addition of the statutory presumptions to preclude a fair opportunity for hearing is not necessary to achieve the Congressional purpose of deterring non-meritorious litigation and operates to the extreme prejudice of those employers who have legitimate grievances.

VII.

CONCLUSION

CP&P requests the Court to find that the imposition of withdrawal liability on CP&P constitutes arbitrary and irrational economic regulation in violation of the due process clause and/or a taking without just compensation in violation of the Fifth Amendment to the United States Constitution as applied. The Ninth Circuit Court of Appeals' decision upholding the imposition of withdrawal liability in this case should be reversed. CP&P also requests that the Court find that the presumptions

[23] *See* 29 U.S.C. § 1401(d).

contained in 29 U.S.C. § 1401 denied petitioner the procedural due process right to an impartial decision maker and reverse the Ninth Circuit on that basis.

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Respectfully submitted,

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APPENDIX

29 U.S.C. § 1381. Withdrawal liability established; criteria and definitions

(a) If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability.

(b) For purposes of subsection (a) of this section –

(1) The withdrawal liability of an employer to a plan is the amount determined under section 1391 of this title to be the allocable amount of unfunded vested benefits, adjusted –

(A) first, by any de minimis reduction applicable under section 1389 of this title,

(B) next, in the case of a partial withdrawal, in accordance with section 1386 of this title,

(C) then, to the extent necessary to reflect the limitation on annual payments under section 1399(c)(1)(B) of this title, and

(D) finally, in accordance with section 1405 of this title.

(2) The term "complete withdrawal" means a complete withdrawal described in section 1383 of this title.

(3) The term "partial withdrawal" means a partial withdrawal described in section 1385 of this title.

(Pub. L. 93-406, Title IV, § 4201, as added Pub. L. 96-364, Title I, § 104(2), Sept. 26, 1980, 94 Stat. 1217.)

29 U.S.C. § 1382. Determination and collection of liability; notification of employer

When an employer withdraws from a multiemployer plan, the plan sponsor, in accordance with this part, shall –

(1) determine the amount of the employer's withdrawal liability,

(2) notify the employer of the amount of the withdrawal liability, and

(3) collect the amount of the withdrawal liability from the employer.

Pub. L. 93-406, Title IV, § 4202, as added Pub. L. 96-364, Title I, § 104(2), Sept. 26, 1980, 94 Stat. 1218.)

29 U.S.C. § 1383. Complete Withdrawal

(a) Determinative factors

For purposes of this part, a complete withdrawal from a multiemployer plan occurs when a employer –

(1) permanently ceases to have an obligation to contribute under the plan, or

(2) permanently ceases all covered operations under the plan.

(b) Building and construction industry

(1) Notwithstanding subsection (a) of this section, in the case of an employer that has an obligation to contribute under a plan for work performed in the building and construction industry, a complete withdrawal occurs only as described in paragraph (2), if –

(A) substantially all the employees with respect to whom the employer has an obligation to contribute under the plan perform work in the building and construction industry, and

(B) the plan –

(i) primarily covers employees in the building and construction industry, or

(ii) is amended to provide that this subsection applies to employers described in this paragraph.

(2) A withdrawal occurs under this paragraph if –

(A) an employer ceases to have an obligation to contribute under the plan, and

(B) the employer –

(i) continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required, or

(ii) resumes such work within 5 years after the date on which the obligation to contribute under the plan ceases, and does not renew the obligation at the time of the resumption.

(3) In the case of a plan terminated by mass withdrawal (within the meaning of section 1341 a(a)(2) of this title), paragraph (2) shall be applied by substituting "3 years" for "5 years" in subparagraph (B)(ii).

(c) Entertainment industry

(1) Notwithstanding subsection (a) of this section, in the case of an employer that has an obligation to contribute under a plan for work performed in the entertainment industry, primarily on a temporary or project-by-project basis, if the plan primarily covers employees in the entertainment industry, a complete withdrawal occurs only as described in subsection (b)(2) of this section applied by substituting "plan" for "collective bargaining agreement" in subparagraph (B)(i) thereof.

(2) For purposes of this subsection, the term "entertainment industry" means –

(A) theater, motion picture (except to the extent provided in regulations prescribed by the corporation), radio, television, sound or visual recording, music, and dance, and

(B) such other entertainment activities as the corporation may determine to be appropriate.

(3) The corporation may by regulation exclude a group or class of employers described in the preceding sentence from the application of this subsection if the corporation determines that such exclusion is necessary –

(A) to protect the interest of the plan's participants and beneficiaries, or

(B) to prevent a significant risk of loss to the corporation with respect to the plan.

(4) A plan may be amended to provide that this subsection shall not apply to a group or class of employers under the plan.

(d) Other determinative factors

(1) Notwithstanding subsection (a) of this section, in the case of an employer who –

(A) has an obligation to contribute under a plan described in paragraph (2) primarily for work described in such paragraph, and

(B) does not continue to perform work within the jurisdiction of the plan,

a complete withdrawal occurs only as described in paragraph (3).

(2) A plan is described in this paragraph if substantially all of the contributions required under the plan are made by employers primarily engaged in the long and short haul trucking industry, the household goods moving industry, or the public warehousing industry.

3) A withdrawal occurs under this paragraph if –

(A) an employer permanently ceases to have an obligation to contribute under the plan or permanently ceases all covered operations under the plan, and

(B) either –

(i) the corporation determines that the plan has suffered substantial damage to its contribution base as a result of such cessation, or

(ii) the employer fails to furnish a bond issued by a corporate surety company that is an acceptable surety for purposes of section 1112 of this title, or an amount held in escrow by a bank or similar financial

institution satisfactory to the plan, in an amount equal to 50 percent of the withdrawal liability of the employer.

(4) If, after an employer furnishes a bond or escrow to a plan under paragraph (3)(B)(ii), the corporation determines that the cessation of the employer's obligation to contribute under the plan (considered together with any cessation by other employers), or cessation of covered operations under the plan, has resulted in substantial damage to the contribution base of the plan, the employer shall be treated as having withdrawn from the plan on the date on which the obligation to contribute or covered operations ceased, and such bond or escrow shall be paid to the plan. The corporation shall not make a determination under this paragraph more than 60 months after the date on which such obligation to contribute or covered operation ceased.

(5) If the corporation determines that the employer has no further liability under the plan either –

(A) because it determines that the contribution base of the plan has not suffered substantial damage as a result of the cessation of the employer's obligation to contribute or cessation of covered operations (considered together with any cessation of contribution obligation, or of covered operations, with respect to other employers), or

(B) because it may not make a determination under the paragraph (4) because of the last sentence thereof,

then the bond shall be cancelled or the escrow refunded.

(6) Nothing in this subsection shall be construed as a limitation on the amount of the withdrawal liability of any employer.

(e) Date of complete withdrawal

For purposes of this part, the date of a complete withdrawal is the date of the cessation of the obligation to contribute or the cessation of covered operations.

(f) Special liability withdrawal rules for industries other than construction and entertainment industries; procedures applicable to amend plans

(1) The corporation may prescribe regulations under which plans in industries other than the construction or entertainment industries may be amended to provide for special withdrawal liability rules similar to the rules described in subsections (b) and (c) of this section.

(2) Regulations under paragraph (1) shall permit use of special withdrawal liability rules –

(A) only in industries (or portions thereof) in which, as determined by the corporation, the characteristics that would make use of such rules appropriate are clearly shown, and

(B) only if the corporation determines, in each instance in which special withdrawal liability rules are permitted, that use of such rules will not pose a significant risk to the corporation under this subchapter.

(Pub. L. 93-406, Title IV, § 4203, as added Pub. L. 96-364, Title I, § 104(2), Sept. 26, 1980, 94 Stat. 1218.)

29 U.S.C. § 1387. Reduction or waiver of complete withdrawal liability; procedures and standards applicable

(a) The corporation shall provide by regulation for the reduction or waiver of liability for a complete withdrawal in the event that an employer who has withdrawn from a plan subsequently resumes covered operations under the plan or renews an obligation to contribute under the plan, to the extent that the corporation determines that reduction or waiver or withdrawal liability is consistent with the purposes of this chapter.

(b) The corporation shall prescribe by regulation a procedure and standards for the amendment of plans to provide alternative rules for the reduction or waiver of liability for a complete withdrawal in the event that an employer who has withdrawn from the plan subsequently resumes covered operations or renews an obligation to contribute under the plan. The rules may apply only to the extent that the rules are consistent with the purposes of this chapter.

(Pub. L. 93-406, Title IV, § 4207, as added Pub. L. 96-364, Title I, § 104(2), Sept. 26, 1980, 94 Stat. 1223.)

29 U.S.C. § 1391. Methods for computing withdrawal liability

(a) Determination of amount of unfunded vested benefits allocable to employer withdrawn from plan.

The amount of the unfunded vested benefits allocable to an employer that withdraws from a plan shall be determined in accordance with subsection (b), (c), or (d) of this section.

(b) Factors determining computation of amount of unfunded vested benefits allocable to employer withdrawn from plan

(1) Except as provided in subsections (c) and (d) of this section, the amount of unfunded vested benefits allocable to an employer that withdraws is the sum of –

(A) the employer's proportional share of the unamortized amount of the change in the plan's unfunded vested benefits for plan years ending after September 25, 1980, as determined under paragraph (2),

(B) the employer's proportional share, if any, of the unamortized amount of the plan's unfunded vested benefits at the end of the plan year ending before September 26, 1980, as determined under paragraph (3); and

(C) the employer's proportional share of the unamortized amounts of the reallocated unfunded vested benefits (if any) as determined under paragraph (4).

If the sum of the amounts determined with respect to an employer under paragraphs (2), (3), and (4) is negative, the unfunded vested benefits allocable to the employer shall be zero.

(2)(A) An employer's proportional share of the unamortized amount of the change in the plan's unfunded vested benefits for the plan years ending after September 25, 1980, is the sum of the employer's proportional shares of the unamortized amount of the change in unfunded vested benefits for each plan year in which the employer has an obligation to contribute under the plan ending –

(i) after such date, and

(ii) before the plan year in which the withdrawal of the employer occurs.

(B) The change in a plan's unfunded vested benefits for a plan year is the amount by which –

(i) the unfunded vested benefits at the end of the plan year; exceeds

(ii) the sum of –

(I) the unamortized amount of the unfunded vested benefits for the last plan year ending before September 26, 1980, and

(II) the sum of the unamortized amounts of the change in unfunded vested benefits for each plan year ending after September 25, 1980, and preceding the plan year for which the change is determined.

(C) The unamortized amount of the change in a plan's unfunded vested benefits with respect to a plan year is the change in unfunded vested benefits for the plan year, reduced by 5 percent of such change for each succeeding plan year.

(D) The unamortized amount of the unfunded vested benefits for the last plan year ending before September 26, 1980, is the amount of the unfunded vested benefits as of the end of that plan year reduced by 5 percent of such amount for each succeeding plan year.

(E) An employer's propositional share of the unamortized amount of a change in unfunded vested benefits is the product of –

(i) the unamortized amount of such change (as of the end of the plan year preceding the plan year in which the employer withdraws); multiplied by

(ii) a fraction –

(I) the numerator of which is the sum of the contributions required to be made under the plan by the employer for the year in which such change arose and for the 4 preceding plan years, and

(II) the denominator of which is the sum for the plan year in which such a change arose and the 4 preceding plan years of all contributions made by employers who had an obligation to contribute under the plan for the plan year in which such change arose reduced by the contributions made in such years by employers who had withdrawn from the plan in the year in which the change arose.

(3) an employer's proportional share of the unamortized amount of the plan's unfunded vested benefits for the last plan year ending before September 26, 1980, is the product of –

(A) such unamortized amount; multiplied by –

(B) a fraction –

(i) the numerator of which is the sum of all contributions required to be made by the employer under the plan for the most recent 5 plan years ending before September 26, 1980, and

(ii) the denominator of which is the sum of all contributions made for the most recent 5 plan

years ending before September 26, 1980, by all employers –

(I) who had an obligation to contribute under the plan for the first plan year ending on or after such date, and

(II) who had not withdrawn from the plan before such date.

(4)(A) An employer's proportional share of the unamortized amount of the reallocated unfunded vested benefits is the sum of the employer's proportional shares of the unamortized amount of the reallocated unfunded vested benefits for each plan year ending before the plan year in which the employer withdrew from the plan.

(B) Except as otherwise provided in regulations prescribed by the corporation, the reallocated unfunded vested benefits for a plan year is the sum of –

(i) any amount which the plan sponsor determines in that plan year to be uncollectible for reasons arising out of cases or proceedings under Title 11, or similar proceedings.

(ii) any amount which the plan sponsor determines in that plan year will not be assessed as a result of the operation of section 1389, 1399(c)(1)(B), or section 1405 of this title against an employer to whom a notice described in section 1399 of this title has been sent, and

(iii) any amount which the plan sponsor determines to be uncollectible or unassessable in that plan year for other reasons under standards not inconsistent with regulations prescribed by the corporation.

(C) The unamortized amount of the reallocated unfunded vested benefits with respect to a plan year is the reallocated unfunded vested benefits for the plan year, reduced by 5 percent of such reallocated unfunded vested benefits for each succeeding plan year.

(D) An employer's proportional share of the unamortized amount of the reallocated unfunded vested benefits with respect to a plan year is the product of –

(i) the unamortized amount of the reallocated unfunded vested benefits (as of the end of the plan year preceding the plan year in which the employer withdraws); multiplied by

(ii) the fraction defined in paragraph (2)(E)(ii).

(c) Amendment of multiemployer plan for determination respecting amount of unfunded vested benefits allocable to employer withdrawn from plan; factors determining computation of amount

(1) A multiemployer plan, other than a plan which primarily covers employees in the building and construction industry, may be amended to provide that the amount of unfunded vested benefits allocable to an employer that withdraws from the plan is an amount determined under paragraph (2), (3), (4), or (5) of this subsection, rather than under subsection (b) or (d) of this section. A plan described in section 1383(b)(1)(B)(i) of this title (relating to the building and construction industry) may be amended, to the extent provided in regulations prescribed by the corporation, to provide that the amount of the unfunded vested benefits allocable to an employer not described in section 1383(b)(1)(A) of this title shall be

determined in a manner different from that provided in subsection (b) of this section.

(2)(A) The amount of the unfunded vested benefits allocable to any employer under this paragraph is the sum of the amounts determined under subparagraphs (B) and (C).

(B) The amount determined under this subparagraph is the product of –

(i) the plan's unfunded vested benefits as of the end of the last plan year ending before September 26, 1980, reduced as if those obligations were being fully amortized in level annual installments over 15 years beginning with the first plan year ending on or after such date; multiplied by

(ii) a fraction –

(I) the numerator of which is the sum of all contributions required to be made by the employer under the plan for the last 5 plan years ending before September 26, 1980, and

(II) The denominator of which is the sum of all contributions made for the last 5 plan years ending before September 26, 1980, by all employers who had an obligation to contribute under the plan for the first plan year ending after September 25, 1980, and who had not withdrawn from the plan before such date.

(C) The amount determined under this subparagraph is the product of –

(i) an amount equal to –

(I) the plan's unfunded vested benefits as of the end of the plan year preceding the plan year in which the employer withdraws, less

(II) the sum of the value as of such date of all outstanding claims for withdrawal liability which can reasonably be expected to be collected, with respect to employers withdrawing before such plan year, and that portion of the amount determined under subparagraph (B)(i) which is allocable to employers who have an obligation to contribute under the plan in the plan year preceding the plan year in which the employer withdraws and who also had an obligation to contribute under the plan for the first plan year ending after September 25, 1980; multiplied by

(ii) a fraction –

(I) the numerator of which is the total amount required to be contributed under the plan by the employer for the last 5 plan years ending before the date on which the employer withdraws, and

(II) the denomination of which is the total amount contributed under the plan by all employers for the last 5 plan years ending before the date on which the employer withdraws, increased by the amount of any employer contributions owed with respect to earlier periods which were collected in those plan years, and decreased by any amount contributed by an employer who withdrew from the plan under this part during those plan years.

(D) The corporation may by regulation permit adjustment in any denominator under this section consistent with the purposes of this subchapter, where such

adjustment would be appropriate to ease administrative burdens of plan sponsors in calculating such denominators.

(3) The amount of the unfunded vested benefits allocable to an employer under this paragraph is the product of-

(A) the plan's unfunded vested benefits as of the end of the plan year preceding the plan year in which the employer withdraws, less the value as of the end of such year of all outstanding claims for withdrawal liability which can reasonably be expected to be collected from employers withdrawing before such year; multiplied by

(B) a fraction –

(i) the numerator of which is the total amount required to be contributed by the employer under the plan for the last 5 plan years ending before the withdrawal, and

(ii) the denominator of which is the total amount contributed under the plan by all employers for the last 5 plan years ending before the withdrawal, increased by any employer contributions owed with respect to earlier periods which were collected in those plan years, and decreased by any amount contributed to the plan during those plan years by employers who withdrew from the plan under this section during those plan years.

(4)(A) The amount of the unfunded vested benefits allocable to an employer under this paragraph is equal to the sum of –

(i) the plan's unfunded vested benefits which are attributable to participants' service with the employer (determined as of the end of the plan year preceding the plan year in which the employer withdraws), and

(ii) the employer's proportional share of any unfunded vested benefits which are not attributable to service with the employer or other employers who are obligated to contribute under the plan in the plan year preceding the plan year in which the employer withdraws (determined as of the end of the plan year preceding the plan year in which the employer withdraws).

(B) The plan's unfunded vested benefits which are attributable to participant's service with the employer is the amount equal to the value of nonforfeitable benefits under the plan which are attributable to participants' service with such employer (determined under plan rules not inconsistent with regulations of the corporation) decreased by the share of plan assets determined under subparagraph (C) which is allocated to the employer as provided under subparagraph (D).

(C) The value of plan assets determined under this subparagraph is the value of plan assets allocated to nonforfeitable benefits which are attributable to service with the employers who have an obligation to contribute under the plan in the plan year preceding the plan year in which the employer withdraws, which is determined by multiplying –

(i) the value of the plan assets as of the end of the plan year preceding the plan year in which the employer withdraws, by

(ii) a fraction –

(I) the numerator of which is the value of nonforfeitable benefits which are attributable to service with such employers, and

(II) the denominator of which is the value of all nonforfeitable benefits under the plan

as of the end of the plan year.

(D) The share of plan assets, determined under subparagraph (C), which is allocated to the employer shall be determined in accordance with one of the following methods which shall be adopted by the plan by amendment:

(i) by multiplying the value of plan assets determined under subparagraph (C) by a fraction –

(I) the numerator of which is the value of the nonforfeitable benefits which are attributable to serve with the employer, and

(II) the denominator of which is the value of the nonforfeitable benefits which are attributable to service with all employers who have an obligation to contribute under the plan in the plan year preceding the plan year in which the employer withdraws;

(ii) by multiplying the value of plan assets under subparagraph (C) by a fraction –

(I) the numerator of which is the sum of all contributions (accumulated with interest) which have been made to the plan by the employer for the plan year preceding

the plan year in which the employer withdraws and all the preceding plan years; and

(II) the denominator of which is the sum of all contrbutions (accumulated with interest) which have been made to the plan (for the plan year preceding the plan year in which the employer withdraws and all preceding plan years) by all employers who have an obligation to contribute to the plan for the plan year preceding the plan year in which the employer withdraws; or

(iii) by multiplying the value of plan assets under subparagraph (C) by a fraction –

(I) the numerator of which is the amount determined under clause (ii)(I) of this subparagraph, less the sum of benefit payments (accumulated with interest) made to participants (and their beneficiaries) for the plan years described in such clause (ii)(I) which are attributable to service with the employer; and

(II) the denominator of which is the amount determined under clause (ii)(II) of this subparagraph, reduced by the sum of benefit payments (accumulated with interest) made to participants (and their beneficiaries) for the plan years described in such clause (ii)(II) which are attributable to service with respect to the employers described in such clause (ii)(II).

(E) The amount of the plan's unfunded vested benefits for a plan year preceding the plan year in which an employer withdraws, which is not attributable to service with employers who have an obligation to contribute

under the plan in the plan year preceding the plan year in which such employer withdraws is equal to –

(i) an amount equal to –

(I) the value of all nonforfeitable benefits under the plan at the end of such plan year, reduced by

(II) the value of nonforfeitable benefits under the plan at the end of such plan year which are attributable to participants' service with employers who have an obligation to contribute under the plan for such plan year; reduced by

(ii) an amount equal to –

(I) the value of the plan assets as of the end of such plan year, reduced by

(II) the value of plan assets as of the end of such plan year as determined under subparagraph (C); reduced by

(iii) the value of all outstanding claims for withdrawal liability which can reasonably be expected to be collected with respect to employers withdrawing before the year preceding the plan year in which the employer withdraws.

(F) The employer's proportional share described in subparagraph (A)(ii) for a plan year is the amount determined under subparagraph (E) for the employer, but not in excess of an amount which bears the same ratio to the sum of the amounts determined under subparagraph (E) for all employers under the plan as the amount determined under subparagraph (C) for the employer bears to

the sum of the amounts determined under subparagraph (C) for all employers under the plan.

(G) The corporation may prescribe by regulation other methods which a plan may adopt for allocating assets to determine the amount of the unfunded vested benefits attributable to service with the employer and to determine the employer's share of unfunded vested benefits not attributable to service with employers who have an obligation to contribute under the plan in the plan year in which the employer withdraws.

(5)(A) The corporation shall prescribe by regulation a procedure by which a plan may, by amendment, adopt any other alternative method for determining an employer's allocable share of unfunded vested benefits under this section, subject to the approval of the corporation based on its determination that adoption of the method by the plan would not significantly increase the risk of loss to plan participants and beneficiaries or to the corporation.

(B) The corporation may prescribe by regulation standard approaches for alternative methods, other than those set forth in the preceding paragraphs of this subsection, which a plan may adopt under subparagraph (A), for which the corporation may waive or modify the approval requirements of subparagraph (A). Any alternative method shall provide for the allocation of substantially all of the plan's unfunded vested benefits amount employers who have an obligation to contribute under the plan.

(C) Unless the corporation by regulation provides otherwise, a plan may be amended to provide that a

period of more than 5 but not more than 10 plan years may be used for determining the numerator and denominator of any fraction which is used under any method authorized under this section for determining an employer's allocable share of unfunded vested benefits under this section.

(D) The corporation may by regulation permit adjustments in any denominator under this section, consistent with the purposes of this subchapter, where such adjustment would be appropriate to ease administrative burdens of plan sponsors in calculating such denominators.

(d) Method of calculating allocable share of employer of unfunded vested benefits set forth in subsection (c)(3) of this section; applicability of certain statutory provisions

(1) The method of calculating an employer's allocable share of unfunded vested benefits set forth in subsection (c)(3) of this section shall be the method for calculating an employer's allocable share of unfunded vested benefits under a plan to which section 404(c) of Title 26, or a continuation of such a plan, applies, unless the plan is amended to adopt another method authorized under subsection (b) or (c) of this section.

(2) Sections 1384, 1389, 1399(c)(1)(B), and 1405 of this title shall not apply with respect to the withdrawal of an employer from a plan described in paragraph (1) unless the plan is amended to provide that any of such sections apply.

(e) Reduction of liability of withdrawn employer in case of transfer of liabilities to another plan incident to withdrawal or partial withdrawal of employer

In the case of a transfer of liabilities to another plan incident to an employer's withdrawal or partial withdrawal, the withdrawn employer's liability under this part shall be reduced in an amount equal to the value, as of the end of the past plan year ending on or before the date of the withdrawal, of the transferred unfunded vested benefits.

(f) Computations applicable in case of withdrawal following merger of multiemployer plans

In the case of a withdrawal following a merger of multiemployer plans, subsection (b), (c), or (d) of this section shall be applied in accordance with regulations prescribed by the corporation; except that, if a withdrawal occurs in the first plan year beginning after a merger of multiemployer plans, the determination under this section shall be made as if each of the multiemployer plans had remained separate plans.

(Pub.L. 93-406, Title IV, § 4211, as added Pub.L. 96-364, Title I § 104(2), Sept. 26, 1980, 94 Stat. 1226, and amended Pub.L. 98-369, Title V, § 558(b)(1)(A), (B), July 18, 1984, 98 Stat. 899; Pub.L. 101-239, Title VII, § 7891(a)(1), Dec. 19, 1989, 103 Stat. 2445.)

29 U.S.C. § 1392. Obligation to contribute

(a) Definition

For purposes of this part, the term "obligation to contribute" means an obligation to contribute arising –

(1) under one or more collective bargaining (or related) agreements, or

(2) as a result of a duty under applicable labor-management relations law, but

does not include an obligation to pay withdrawal liability under this section or to pay delinquent contributions.

(b) Payments of withdrawal liability not considered contributions

Payments of withdrawal liability under this part shall not be considered contributions for purposes of this part.

(c) Transactions to evade or avoid liability

If a principal purpose of any transaction is to evade or avoid liability under this part, this part shall be applied (and liability shall be determined and collected) without regard to such transaction.

(Pub.L. 93-406, Title IV, § 4212, as added Pub.L. 96-364, Title I, § 104(2), Sept. 26, 1980, 94 Stat. 1233.)

29 U.S.C. § 1393. Actuarial assumptions

(a) Use by plan actuary in determining unfunded vested benefits of a plan for computing withdrawal liability of employer

The corporation may prescribe by regulation actuarial assumptions which may be used by a plan actuary in determining the unfunded vested benefits of a plan for purposes of determining an employer's withdrawal liability under this part. Withdrawal liability under this part shall be determined by each plan on the basis of –

(1) actuarial assumptions and methods which, in the aggregate, are reasonable (taking into account the

experience of the plan and reasonable expectations) and which, in combination, offer the actuary's best estimate of anticipated experience under the plan, or

(2) actuarial assumptions and methods set forth in the corporation's regulations for purposes of determining an employer's withdrawal liability.

(b) Factors determinative of unfunded vested benefits of plan for computing withdrawal liability of employer

In determining the unfunded vested benefits of a plan for purposes of determining an employer's withdrawal liability under this part, the plan actuary may –

(1) rely on the most recent complete actuarial valuation used for purposes of section 412 of Title 26 and reasonable estimates for the interim years of the unfunded vested benefits, and

(2) in the absence of complete data, rely on the data available or on data secured by a sampling which can reasonably be expected to be representative of the status of the entire plan.

(c) Determination of amount of unfunded vested benefits

For purposes of this part, the term "unfunded vested benefits" means with respect to a plan, an amount equal to –

(A) the value of nonforfeitable benefits under the plan, less

(B) the value of the assets of the plan.

(Pub.L. 93-406, Title IV, § 4213, as added Pub.L. 96-364, Title I § 104(2), Sept. 26, 1980, 94 Stat. 1233, and amended Pub.L. 101-239, Title VII, § 7891(a)(1), Dec. 19, 1989, 103 Stat. 2445.)

29 U.S.C. § 1397. Application of part in case of certain pre-1980 withdrawals; adjustment of covered plan

(a) For the purpose of determining the amount of unfunded vested benefits allocable to an employer for a partial or complete withdrawal from a plan which occurs after September 25, 1980, and for the purpose of determining whether there has been a partial withdrawal after such date, the amount of contributions, and the number of contribution based units, of such employer properly allocable –

(1) to work performed under a collective bargaining agreement for which there was a permanent cessation of the obligation to contribute before September 26, 1980, or

(2) to work performed at a facility at which all covered operations permanently ceased before September 26, 1980, or for which there was a permanent cessation of the obligation to contribute before that date,

shall not be taken into account.

(b) A plan may, in a manner not inconsistent with regulations, which shall be prescribed by the corporation, adjust the amount of unfunded vested benefits allocable to other employers under a plan maintained by an employer described in subsection (a) of this section.

(Pub.L. 93-406, Title IV, § 4217, as added Pub.L. 96-364, Title I § 104(2), Sept. 26, 1980, 94 Stat. 1235, and amended

Pub.L. 92-369, Title V, § 558(b)(1)(A), (B), July 18, 1984, 98 Stat. 899.)

29 U.S.C. § 1399. Notice, collection, etc., of withdrawal liability

(a) Furnishing of information by employer to plan sponsor

An employer shall, within 30 days after a written request from the plan sponsor, furnish such information as the plan sponsor reasonably determines to be necessary to enable the plan sponsor to comply with the requirements of this part.

(b) Notification, demand for payment, and review upon complete or partial withdrawal by employer

(1) As soon as practicable after an employer's complete or partial withdrawal, the plan sponsor shall –

(A) notify the employer of –

(i) the amount of the liability, and

(ii) the schedule for liability payments, and

(B) demand payment in accordance with the schedule.

(2)(A) No later than 90 days after the employer receives the notice described in paragraph (1), the employer –

(i) may ask the plan sponsor to review any specific matter relating to the determination of the employer's liability and the schedule of payments,

(ii) may identify any inaccuracy in the determination of the amount of the unfunded vested benefits allocable to the employer, and

(iii) may furnish any additional relevant information to the plan sponsor.

(B) After a reasonable review of any matter raised, the plan sponsor shall notify the employer of –

(i) the plan sponsor's decision,

(ii) the basis for the decision, and

(iii) the reason for any change in the determination of the employer's liability or schedule of liability payments.

(c) Payment requirements; amount, etc.

(1) (A) (i) Except as provided in subparagraphs (B) and (D) of this paragraph and in paragraphs (4) and (5), an employer shall pay the amount determined under section 1391 of this title, adjusted if appropriate first under section 1389 of this title and then under section 1386 of this title over the period of years necessary to amortize the amount in level annual payments determined under subparagraph (C), calculated as if the first payment were made on the first day of the plan year following the plan year in which the withdrawal occurs and as if each subsequent payment were made of the first day of each subsequent plan year. Actual payment shall commence in accordance with paragraph (2).

(ii) The determination of the amortization period described in clause (i) shall be based on the assumptions used for the most recent actuarial valuation for the plan.

(B) In any case in which the amortization period described in subparagraph (A) exceeds 20 years, the employer's liability shall be limited to the first 20 annual payments determined under subparagraph (C).

(C) (i) Except as provided in subparagraph (E), the amount of each annual payment shall be the product of –

(I) the average annual number of contribution base units for the period of 3 consecutive plan years, during the period of 10 consecutive plan years ending before the plan year in which the withdrawal occurs, in which the number of contribution base units for which the employer had an obligation to contribute under the plan is the highest, and

(II) the highest contribution rate at which the employer had an obligation to contribute under the plan during the 10 plan years ending with the plan year in which the withdrawal occurs.

For purposes of the preceding sentence, a partial withdrawal described in section 1385(a)(1) of this title shall be deemed to occur on the last day of the first year of the 3-year testing period described in section 1385(b)(1)(B)(i) of this title.

(ii) (I) A plan may be amended to provide that for any plan year ending before 1986 the amount of each annual payment shall be (in lieu of the amount determined under the clause (i)) the average of the required employer contributions under the plan for the period of 3 consecutive plan years (during the period of 10 consecutive plan years ending with the plan year preceding the

plan year in which the withdrawal occurs) for which such required contributions were the highest.

(II) Subparagraph (B) shall not apply to any plan year to which this clause applies.

(III) This clause shall not apply in the case of any withdrawal described in subparagraph (D).

(IV) If under a plan this cause applies to any plan year but does not apply to the next plan year, this clause shall not apply to any plan year after such next plan year.

(V) For purposes of this clause, the term "required contributions" means, for any period, the amounts which the employer was obligated to contribute for such period (not taking into account any delinquent contribution for any other period).

(iii) A plan may be amended to provide that for the first plan year ending on or after September 26, 1980, the number "5" shall be substituted for the number "10" each place it appears in clause (i) or clause (ii) (whichever is appropriate). If the plan is so amended, the number "5" shall be increased by one for each succeeding plan year until the number "10" is reached.

(D) In any case in which a multiemployer plan terminates by the withdrawal of every employer from the plan, or in which substantially all the employers withdraw from a plan pursuant to an agreement or arrangement to withdrawal from the plan –

(i) the liability of each such employer who has withdrawn shall be determined (or redetermined) under this paragraph without regard to subparagraph (B), and

(ii) notwithstanding any other provision of this part, the total unfunded vested benefits of the plan shall be fully allocated among all such employers in a manner not inconsistent with regulations which shall be prescribed by the corporation.

Withdrawal by an employer from a plan, during a period of 3 consecutive plan years within which substantially all the employers who have an obligation to contribute under the plan withdraw, shall be presumed to be a withdrawal pursuant to an agreement or arrangement, unless the employer proves otherwise by a preponderance of the evidence.

(E) In the case of a partial withdrawal described in section 1385(a) of this title, the amount of each annual payment shall be the product of –

(i) the amount determined under subparagraph (C) (determined without regard to this subparagraph), multiplied by

(ii) the fraction determined under section 1386(a)(2) of this title.

(2) Withdrawal liability shall be payable in accordance with the schedule set forth by the plan sponsor under subsection (b)(1) of this section beginning no later than 60 days after the date of the demand notwithstanding any request for review or appeal of determinations of the amount of such liability or of the schedule.

(3) Each annual payment determined under paragraph (1)(C) shall be payable in 4 equal installments due quarterly, or at other intervals specified by plan rules. If a payment is not made when due, interest on the payment

shall accrue from the due date until the date on which the payment is made.

(4) The employer shall be entitled to prepay the outstanding amount of the unpaid annual withdrawal liability payments determined under paragraph (1)(C), plus accrued interest, if any, in whole or in part, without penalty. If the prepayment is made pursuant to a withdrawal which is later determined to be part of a withdrawal described in paragraph (1)(D), the withdrawal liability of the employer shall not be limited to the amount of the prepayment.

(5) In the event of a default, a plan sponsor may require immediate payment of the outstanding amount of an employer's withdrawal liability, plus accrued interest on the total outstanding liability from the due date of the first payment which was not timely made. For purposes of this section, the term "default" means –

(A) the failure of an employer to make, when due, any payment under this section, if the failure is not cured within 60 days after the employer receives written notification from the plan sponsor of such failure, and

(B) any other event defined in rules adopted by the plan which indicates a substantial likelihood that an employer will be unable to pay its withdrawal liability.

(6) Except as provided in paragraph (1)(A)(ii), interest under this subsection shall be charged at rates based on prevailing market rates for comparable obligations, in accordance with regulations prescribed by the corporation.

(7) A multiemployer plan may adopt rules for other terms and conditions for the satisfaction of an employer's withdrawal liability if such rules –

(A) are consistent with this chapter, and

(B) are not inconsistent with regulations of the corporation.

(8) In the case of a terminated multiemployer plan, an employer's obligation to make payments under this section ceases at the end of the plan year in which the assets of the plan (exclusive of withdrawal liability claims) are sufficient to meet all obligations of the plan, as determined by the corporation.

(d) Applicability of statutory prohibitions

The prohibitions provided in section 1106(a) of this title do not apply to any action required or permitted under this part.

(Pub.L. 93-406, Title IV, § 4219, as added Pub.L. 96-364, Title I § 104(2), Sept. 26, 1980, 94 Stat. 1236, and amended Pub.L. 98-369, Title V, § 558(b)(1)(B), July 18, 1984, 98 Stat. 899.)

29 U.S.C. § 1401. Resolution of disputes

(a) Arbitration proceedings; matters subject to arbitration, procedures applicable, etc.

(1) Any dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made under sections 1381 through 1399 of this title shall be resolved through arbitration. Either party may initiate the arbitration proceeding within a 60-day period after the earlier of –

(A) the date of notification to the employer under section 1399(b)(2)(B) of this title, or

(B) 120 days after the date of the employer's request under section 1399(b)(2)(A) of this title.

The parties may jointly initiate arbitration within the 180-day period after the date of the plan sponsor's demand under section 1399(b)(1) of this title.

(2) An arbitration proceeding under this section shall be conducted in accordance with fair and equitable procedures to be promulgated by the corporation. The plan sponsor may purchase insurance to cover potential liability of the arbitrator. If the parties have not provided for the costs of the arbitration, including arbitrator's fees, by agreement, the arbitrator shall assess such fees. The arbitrator may also award reasonable attorney's fees.

(3)(A) For purposes of any proceeding under this section, any determination made by a plan sponsor under sections 1381 through 1399 of this title and section 1405 of this title is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous.

(B) In the case of the determination of a plan's unfunded vested benefits for a plan year, the determination is presumed correct unless a party contesting the determination shows by a preponderance of evidence that –

(i) the actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations), or

(ii) the plan's actuary made a significant error in applying the actuarial assumptions or methods.

(b) Alternative collection proceedings; civil action subsequent to arbitration award; conduct of arbitration proceedings

(1) If no arbitration proceeding has been initiated pursuant to subsection (a) of this section, the amounts demanded by the plan sponsor under section 1399(b)(1) of this title shall be due and owing on the schedule set forth by the plan sponsor. The plan sponsor may bring an action in a State or Federal court of competent jurisdiction for collection.

(2) Upon completion of the arbitration proceedings in favor of one of the parties, any party thereto may bring an action, no later than 30 days after the issuance of an arbitrator's award, in an appropriate United States district court in accordance with section 1451 of this title to enforce, vacate, or modify the arbitrator's award.

(3) Any arbitration proceedings under this section shall, to the extent consistent with this subchapter, be conducted in the same manner, subject to the same limitations, carried out with the same powers (including subpena power), and enforced in United States courts as an arbitration proceeding carried out under Title 9.

(c) Presumption respecting finding of fact by arbitrator

In any proceeding under subsection (b) of this section, there shall be a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct.

(d) Payments by employer prior and subsequent to determination by arbitrator; adjustments; failure of employer to make payments

Payments shall be made by an employer in accordance with the determinations made under this part until the arbitrator issues a final decision with respect to the determination submitted for arbitration, with any necessary adjustments in subsequent payments for overpayments or underpayments arising out of the decision of the arbitrator with respect to the determination. If the employer fails to make timely payment in accordance with such final decision, the employer shall be treated as being delinquent in the making of a contribution required under the plan (within the meaning of section 1145 of this title).

(e) Furnishing of information by plan sponsor to employer respecting computation of withdrawal liability of employer; fees

If any employer requests in writing that the plan sponsor make available to the employer general information necessary for the employer to compute its withdrawal liability with respect to the plan (other than information which is unique to that employer), the plan sponsor shall furnish the information to the employer

without charge. If any employer requests in writing that the plan sponsor make an estimate of such employer's potential withdrawal liability with respect to the plan or to provide information unique to that employer, the plan sponsor may require the employer to pay the reasonable cost of making such estimate or providing such information.

(Pub.L. 93-406, Title IV, § 4221, as added Pub.L. 96-364, Title I § 104(2), Sept. 26, 1980, 94 Stat. 1239.)

29 U.S.C. § 1451. Civil Actions

(a) Persons entitled to maintain actions

(1) A plan fiduciary, employer, plan participant, or beneficiary, who is adversely affected by the act or omission of any party under this subtitle with respect to a multiemployer plan, or an employee organization which represents such a plan participant or beneficiary for purposes of collective bargaining, may bring an action for appropriate legal or equitable relief, or both.

(2) Notwithstanding paragraph (1), this section does not authorize an action against the Secretary of the Treasury, the Secretary of Labor, or the corporation.

(b) Failure of employer to make withdrawal liability payment within prescribed time

In any action under this section to compel an employer to pay withdrawal liability, any failure of the employer to make any withdrawal liability payment within the time prescribed shall be treated in the same manner as a delinquent contribution (within the meaning of section 1145 of this title).

(c) Jurisdiction of Federal and State courts

The district courts of the United States shall have exclusive jurisdiction of an action under this section without regard to the amount in controversy, except the State courts of competent jurisdiction shall have concurrent jurisdiction over an action brought by a plan fiduciary to collect withdrawal liability.

(d) Venue and service of process

An action under this section may be brought in the district where the plan is administered or where a defendant resides or does business, and process may be served in any district where a defendant resides, does business, or may be found.

(e) Costs and expenses

In any action under this section, the court may award all or a portion of the costs and expenses incurred in connection with such action including, reasonable attorney's fees, to the prevailing party.

(f) Time limitations

An action under this section may not be brought after the later of –

(1) 6 years after the date on which the cause of action arose, or

(2) 3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; except that in the case of fraud or concealment, such action may be brought not later than 6 years after the date of discovery of the existence of such cause of action.

(g) Service of complaint on corporation; intervention by corporation

A copy of the complaint in any action under this section or section 1401 of this title shall be served upon the corporation by certified mail. The corporation may intervene in any such action.

(Pub.L. 93-406, Title IV, § 4301, as added Pub.L. 96-364, Title I § 104(2), Sept. 26, 1980, 94 Stat. 1263.)